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Brief of Johnson for P. E.

Filed Oct. 15, 1902.

SUPREME COURT

OF THE

UNITED STATES

Oct. Term, 1902.

JOSEPH H. BEALS,
Plaintiff in Error,

v.

JAMES J. CONE and LYMAN ROBISON,
Defendants in Error.

Brief of Plaintiff in Error.

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In the

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v.

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Defendants in Error.

No. 84.

Statement of the Case.

This action was based upon an adverse claim. One of the material allegations of the complaint is:

"That he claims the legal right to occupy and possess said premises and is entitled to the possession thereof by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and of said State of Colorado, and by actual prior possession, as a lode mining claim, located on the public domain of the United States" (record, folio 3).

said cause; and as to the second replication, these defendants say that the same does not state facts sufficient to constitute a defense against the answer and counter-claim of the defendants herein; that the said replication is in effect a plea of *res adjudicata* to the said counter-claim of the defendants, and that the matters and things therein alleged do not constitute an adjudication of any of the matters and things in said counter-claim set forth.

And for cause of demurrer to the third replication of the said plaintiff, these defendants say that the same does not state facts sufficient to constitute a defense to the answer and counter-claim of these defendants, because they say that the same assumes to be a plea of estoppel to the defendants' said counter-claim, and that the matters and things therein set forth do not constitute an estoppel, either equitable or otherwise, against these defendants.

Wherefore, these defendants pray judgment against the said plaintiff as to said replication."

The trial Court sustained this demurrer (record, folio 15). The Supreme Court sustained this ruling. Error is assigned upon this ruling of the Supreme Court by the first and second assignments of error. There was a verdict and judgment for the plaintiff, which were vacated and set aside upon defendants paying the costs (record, folios 18 and 19).

On February 9, 1898, the case came on for a second trial, and the defendants demanded a jury of twelve men, which was granted (record, folio 21). Thereupon it was ordered that the jury be kept together and in charge of a bailiff during the recesses and adjournments of the Court while the trial of the cause was in progress (record, folio 22). The trial proceeded from February 9th to February 17th, and on February 18th the jury rendered the following verdict:

"We, the jury, find the issues herein joined for the defendants, and we further find that they have established their title and right to, and are entitled to the possession and occupancy of, the premises in controversy, by reason of a full compliance with the acts of Congress and the laws of the State of Colorado relating thereto" (record, folio 28).

To this verdict the plaintiffs duly excepted.

A motion for a new trial was made, heard and overruled (record, folio 34). Judgment was then entered upon the verdict (record, folio 35). An appeal to the Supreme Court of Colorado was prayed and perfected (record, folios 35 to 37).

At the trial plaintiff testified that he resided in Denver; that he was born in Massachusetts; that his father and himself were both citizens of the United States; that he was one of the original locators of the Tecumseh lode; that the other original locators were Joseph Beals, his father, and D. J. Bridge, and that under the later location certificate he held the title for the benefit of himself and the other original locators (record, folios 42 and 48). Thereupon plaintiff offered in evidence two location certificates: one dated June 18, 1894, and the other May 3, 1892. The Court excluded the certificate of the earlier date and admitted the other (record, folios 43 to 46 and 267). The Supreme Court affirmed this ruling, and this ruling of the Supreme Court is the subject of the fourth assignment of error in this Court.

D. J. Bridge, a witness for the plaintiff, testified that he was one of the original locators of the Tecumseh claim; that he located the claim on April 18th, 1892, by putting up a stake with a notice upon

it in the usual form, and afterwards doing the necessary assessment work and further development; that the notice contained the name of the lode, which was Tecumseh, and the names of the parties locating; that he sunk a shaft by this post to the depth of 13 feet, and then let a contract for the sinking of this shaft 30 feet deeper, making the shaft 43 feet in depth; that he found an open crevice from which he got small assays; but he did not think this was sufficient to constitute a vein; that at the time he was sinking this shaft he saw another shaft called the Ophir, which had been sunk about 8½ feet; that the Ophir shaft was not sunk any deeper than 8½ feet until after the Tecumseh shaft had been sunk 43 feet deep; that he again examined this Ophir shaft for the purpose of testifying before the Land Office at Pueblo on October 11th, 1893; that he then found the Ophir shaft to be 25 feet deep, and contained no indication of the existence of a mineral vein; that after doing the assessment work on the Tecumseh claim, he had the claim surveyed and put up the corner and side stakes and filed a location certificate (record, folios 48 to 53).

E. M. Hoenshell, a witness for the plaintiff, testified that he helped D. J. Bridge locate the Tecumseh claim in the spring of 1892; that he helped finish the location work; that a discovery notice was put up; that this notice contained a description of the claim; the name of the lode and the names of the locators and the date of location; that the claim was surveyed and recorded; that at the time of the survey an open cut had been made

and the shaft sunk to the depth of 13 feet; that he saw this shaft after it had been sunk to the depth of 30 feet; that at this time the Ophir shaft was between 8 and 9 feet in depth and contained no symptom of discovery; that he examined this Ophir shaft again in 1893 in company with Mr. Bridge and for the purpose of testifying before the Land Office on October 11, 1893; that the shaft was then 24 feet and 10 inches in depth and contained no sign of any mineral vein and no crevice of any kind (record, folios 62 and 65).

We have set forth the above testimony for the purpose of showing that there was a complete foundation laid for the introduction of the original location certificate of the Tecumseh lode which was excluded by the Court.

J. W. Carr, witness for plaintiff, testified: Reside at Victor, Colorado; been mining off and and on for sixteen years; have been acquainted with the Tecumseh and Ophir lodes since 1894. In February, 1894, I had a lease and bond on the Tecumseh, and entered into a contract with plaintiff for an interest in the property for finding a vein and doing a certain amount of development work on it. At that time there was a shaft on the Tecumseh between 40 and 50 feet deep. The Ophir shaft at that time was between 25 and 26 feet in depth. I measured it in June or July, 1894. I begun work in the latter part of March or early part of April for the purpose of trying to find a vein upon which to make a valid location. My contract with Dr. Beals obliged me to make a discovery of

mineral. I knew there had been an application for a patent by the Ophir people, and a protest against the issuance of that patent, and that this protest was then pending and undecided. I examined the Ophir shaft and the Tecumseh property with the view of determining whether I would expend money upon the Tecumseh or not. We began work by trenching, looking for a vein near the present Tecumseh discovery shaft. We found, near the surface, just through the wash, what afterwards proved to be the hanging wall of our present vein. We followed that down to a depth of 38 feet, and we did about 10 feet of drifting east from the bottom of the shaft. This is what is known as the present discovery shaft. We discovered a well defined vein extending from near the top of the solid rock to the bottom of the shaft. That shaft is now substantially in the condition it was at that time. After sinking this shaft and learning the direction, we moved further up the hill and sunk two or three shafts, and did considerable trenching and some drifting. We discovered a well defined mineral-bearing vein in shaft No. 2. This shaft was about 45 feet deep. We finished the discovery shaft about the middle of June, 1894; we finished shaft No. 2 and the drift, about 12 feet, about the 1st of September, 1894. We then sunk shaft No. 3, marked on the plat, to a depth of 46 feet. We had a well defined vein in this shaft as soon as we got through the wash to the bottom of the shaft. We ran a drift from the bottom of the shaft on the vein 36 feet north from the shaft. This was also in 1894. During the time we were doing

all this work, the Ophir shaft remained at a depth of 25 feet. No work was done on the Ophir shaft until about the 1st of July, 1895. I examined the Ophir shaft for the purpose of determining whether any discovery had been made, and with the understanding that if any discovery had been made I would be wasting all my money in doing this work. The work I expended on the Tecumseh was made on the faith of my belief and judgment that there was no mineral in the Ophir discovery shaft. Mineral was discovered in this Ophir shaft at about 34 feet from the surface after they resumed work in 1895. There is now no indication of any vein above a point 34 feet below the surface in that shaft. Work has been done exceeding in value $100 every year since 1894. We have done on the Tecumseh lode between 900 and 1,100 feet in shafts, drifts and winzes. I filed affidavit of labor and improvements on the Tecumseh for 1894-5, as shown by exhibits F and G. Shafts Nos. 2 and 3 contained well defined veins. I did not relocate on either of these discoveries which were made about a year before the others did any more work on the Ophir, simply because we had a discovery in our discovery shaft the validity of which could not be questioned.

MR. THOMAS: I will say now that we will not offer any testimony to the effect that there is not any vein in shafts No. 2 and No. 3 (record, folios 75 to 84).

The above testimony of Mr. Carr and the statement of Mr. Thomas is set forth for the purpose of

showing that it was clearly established and practically admitted that plaintiff discovered mineral-bearing veins in shafts numbered 2 and 3.

The plaintiff offered in evidence a certificate of the cancellation of the entry of the Ophir lode together with two decisions of the Secretary of the Interior adjudicating that the defendants had made no discovery of a vein in the said Ophir claim. These documents were all excluded (record, folios 243 to 256). The Supreme Court affirmed this ruling and this ruling of the Supreme Court is assigned for error in this Court by the third assignment.

The fifth assignment of error is as follows:

"The said Supreme Court erred in sustaining the ruling of the Court below in giving instructions numbered three, four, five and six and sixteen, which said instructions are as follows:

3. What is meant by a vein or lode under the statute is a body of mineral or mineral-bearing rock, with defined boundaries in the general mass of the mountain. This vein, lode, or body of mineralized rock must contain an appreciable quantity of some of the precious metals, such as gold and silver. While the vein must be found in rock in place, that is, separated by well defined boundaries from the general mass of the mountain, it is not necessary that it should have these characteristics at the surface, or that it should be, theoretically, perfect in all respects as to all these characteristics. If the vein in continuing down passes or is included within walls of rock in place, it is a sufficient discovery, if it is sufficient in other particulars, that is, containing mineralized rock, bearing appreciable quantity of precious metal. Theoretically, a vein must have two walls which clearly separate it from the general mass of the mountain, but, for the purposes of this case, you are instructed that if there is a body of mineralized rock, containing appreciable quantities of some of the metals, and if it is found in place, it is not necessary that it should have two

well-defined walls; it is, for practical purposes a vein, if the mineralized body of rock, or the body of mineral, is found in the general mass of the mountain, and if it continues unbroken and without interruption, it is regarded as a vein whatever the boundaries may be; and if it contains such a showing of mineral in connection therewith as that a competent miner would be willing to follow it in prospecting, in the expectation of reaching thereby richer or larger quantities of ore beyond. Such vein may be very thin or wide, or it may be rich or nearly barren. It is neither the width of the crevice, nor the richness of its contents that alone determine whether that which is discovered is a vein or a lode within the meaning of the statutes. A mineral vein or lode, whether small or large, rich or poor, at the point of discovery, if discovered and located in compliance with the acts of Congress and the statutes of the State, creates the title and the right of possession as set forth in these instructions.

4. The vein or lode which the law requires to be discovered need not contain, as disclosed in the discovery shaft, ore or mineral, in the sense that it will pay for extraction or shipment, but the vein or lode must appear as a distinctive formation in the country rock, and appear therein in the nature of mineral or mineral-bearing rock, different in character and nature from the country rock enclosing it. And in this connection, in this definition, the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode or vein, whatever the boundaries may be. On the other hand, with well-defined boundaries, very slight evidence of such mineral would be sufficient to establish the existence of a lode. Such boundaries constitute a fissure, and if in such fissure mineral is found, although in small quantities, it may be called a lode or vein.

5. In this connection the Court instructs you that it is not necessary to the existence of—a thing as a vein, that the mineral-bearing rock or the rock which carries the mineral, should be quartz; it may be any other kind of rock carrying mineral, even

though the rock itself was originally of the same character, or composition, as the surrounding walls, and though it may be subsequently changed or decomposed, by natural agencies, from its original character, provided that one may detect in the ground and mark the boundaries between such mineral-bearing rock and its enclosing walls, *or by assays establish the difference between the walls and the mineral-bearing rock.*

6. The Court instructs you that the statute requires that the vein or lode must be in place. This term indicates the body of the country which has been affected by the action of the elements, and which remains in its original state and condition, as distinguished from the superficial mass which may lie above it. A continuous body of mineral or mineral-bearing rock, extending through loose, disjointed rocks, is a lode as fully as that which is found in the more regular formation, and if the lode is, in the general mass of the mountain, as distinguished from slide, debris or tumble stuff on the surface, it is in place within the meaning of the act of Congress. If the principal part of the rock about the mineral is in its original position, according to the present structure of the mountain, the lode is in place, although some masses of the rock or boulders may be associated with the ore.

16. The term 'well-defined crevice,' as used in the statute, is intended to mean a vein, or lode or ledge of mineral-bearing rock between walls In its practical application, however, it must be considered in connection with the character of the mineral deposit which is the subject of location. If the lode is very wide, or is horizontal, or exists with boundaries ascertainable, by assays or analysis, then a discovery shaft sunk into or upon or through the same at a distance of ten feet or more below the surface, is in effect the exposure of such a well-defined crevice as the law requires, for, were it otherwise, many metalliferous lodes or deposits could not be located or appropriated at all. These instructions (all bearing on the same subject) were each and every one of them erroneous, for the reasons:

First—They are abstract in form. They were intended to apply to both the Tecumseh and the Ophir discovery shafts. There was no similarity between these shafts.

The Tecumseh shaft contained a well-defined crevice, and the only point of dispute was as to whether such crevice contained such mineral-bearing rock as would make it a vein. The Ophir shaft, at the depth of twenty-five feet, contained no crevice, and the only claim made for it was that the rock had been impregnated with mineral from a crevice that was reached at a depth of thirty-four feet.

Second—They authorized the jury to find that a vein was discovered in the Ophir shaft, at a depth of twenty-five feet, on evidence for which the highest claim that was or could be made was, that it tended to show that the country rock above the hanging wall of the vein subsequently discovered, had been impregnated with mineral from such vein.

Third—Instruction three authorized the jury to find that a vein had been discovered in the Ophir shaft, at a depth of twenty-five feet, notwithstanding no well-defined crevice had been reached; neither wall of a vein had been reached, and no point had been reached which subsequent development showed was within any boundaries or walls of a vein. All that was required was that, irrespective of walls, boundaries or formation, there should be 'such a showing of mineral in connection therewith as that a competent miner would be willing to follow it in prospecting, in the expectation of reaching thereby richer or larger quantities of ore beyond.'

Fourth—The fourth and fifth instructions, as applied to the Ophir lode, practically advised the jury that any mineral-bearing rock that would assay would, irrespective of any fissure or its boundaries, constitute a vein.

"*Fifth*—The sixth instruction authorized a body of mineral-bearing rock, (as formerly defined) extending through loose, disjointed rocks, to be pronounced a vein.

"*Sixth*—The sixteenth instruction entirely dispenses with any necessity of discovering a well-defined crevice (as require by the State statute) or a vein (as required by the act of Congress).

"*Seventh*—Said instructions are not, as applicable to the Ophir shaft, based upon any evidence in the cause.

"*Eighth*—None of said instructions properly define a vein within the meaning of the act of Congress requiring the discovery of a vein within the limits of the claim" (record, folios 764-768)."

The evidence and the question of the lack of evidence relating to the above instructions will be set forth and discussed in the proper connection.

A statutory provision of Colorado, relating to the marking of the boundaries of a mining claim, reads as follows:

"Such surface boundaries shall be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to-wit: one at each corner and one at the center of each side line. Where it is practically impossible, on account of bed rock, to sink such posts, they may be placed in a pile of stones, and where, in marking the surface boundaries of a claim, any one or more of such posts shall fall, by right, upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place" (2 Mills' Stat., Sec. 3153).

The sixth assignment of error is based upon the ruling of the Supreme Court sustaining the trial Court in giving Instruction 18, which said instruction is as follows:

"Upon that point the Court instructs you that unless you find from the evidence that the southwest corner of the Tecumseh claim fell upon precipitous ground, and within the lines of the rails of the Florence and Cripple Creek railroad, or so near to one or the other of them that the erection thereof would be interfered with by the passage of trains, and was for that reason impracticable, then you are instructed that it was the duty of the plaintiff to set his post at such corner. If, on the other hand, you should believe from the evidence, that the proper placing of such stake was within the lines of the rails of said road, then you are instructed that under the statute such witness corner shall be set at the nearest practicable point. Whether this was done, you are to determine from the evidence in the case, and unless you should believe in that event that the said witness corner was set

substantially at the nearest practicable point, the marking of said claim would be invalid" (record, folio 769).

Upon the subject of the discovery shaft required by the State statute and the discovery of a vein within the limits of the claim required by the act of Congress, the plaintiff asked and the Court refused instructions one and ten, and in lieu thereof gave Instruction No. 21, which said instructions are as follows:

"1. No location of a mining claim is valid unless the locator has sunk a discovery shaft deep enough to show a well-defined crevice, and in addition thereto, has discovered the vein or lode within the limits of the claim; and, if the jury believe from the evidence that the Ophir claim was located in 1 92; that during that year the discovery shaft was sunk to a depth from twenty-five to twenty-eight feet; that no well-defined crevice was shown therein, or that no vein or lode was discovered therein; that plaintiff perfected a valid location in 1894 by sinking a discovery shaft on the Tecumseh to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and found a well-defined crevice therein, *and discovered a vein or lode of mineral within the limits of said Tecumseh claim;* that he posted at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator and the date of discovery, and marked the surface boundaries with six substantial posts, either of wood or stone, sunk in the ground, to wit: one at each corner, and one at the center of each side line, marked on the side or sides which were in towards the claim; that plaintiff executed and filed the location certificate introduced in evidence; that plaintiff, or any one claiming under him, has done $100.00 of labor or improvements on said Tecumseh claim for each year since 1894, they will find the plaintiff is entitled to possession of the ground in conflict by virtue of a compliance with the statutes of the United States, and the State of Colorado."

"10. If the jury believe from the evidence that plaintiff has disclosed in his discovery shaft a well-defined crevice containing mineral in appreciable quantities, by which is meant quantities

which can be weighed and assayed, and running from $1.00 to $3 00 or $4.00 per ton, and that such mineral is found in occasional spots in such crevices; and that this discovery was made prior to any similar discovery on the Ophir claim, and the plaintiff has complied with the laws of the State and the United States, as defined in these instructions, then your verdict will be for the plaintiff."

"21. You are further instructed that while the statutes do not require that the discoverer of mineral or of a vein should sink his discovery shaft at the point of discovery, but may sink the same at any point within the exterior boundaries of the claim he may desire, nevertheless you are instructed that it must be sunk upon a vein within said boundaries, *and that the right and extent of the lode mining location must be measured by and from such discovery shaft and its position within the lines of said location*" (record, folios 769-770).

Upon this subject the State statute provides:

"Before filing such location certificate the discoverer shall locate his claim by:

First—Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well defined crevice.

Second—By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

Third—By marking the surface boundaries of the claim" (2 Mills' Statutes, section 3152).

The act of Congress provides:

"But no location of a mining claim shall be made until the *discovery of a vein or lode within limits of the claim located*" (Revised Statutes U. S , section 2320).

The Supreme Court sustained the trial Court in refusing said last mentioned instructions one and ten, and in giving said instruction numbered twenty-one, and this ruling of the Supreme Court

is challenged by our seventh assignment of error.

An act of Congress of March 3, 1881, provides:

"That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for the ground in controversy until he shall have perfected his title."

Another act of Congress relating to the location and holding of mining claims provides:

"Not less than one hundred dollars worth of labor shall be performed or improvements made during each year" (Revised Statutes, section 2324).

The trial Court instructed the jury as follows:

"24. Upon this point the Court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and the plaintiff, claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon, is on the plaintiff; and unless he has shown you by a fair preponderance of the evidence that the work was not done, you are to determine that question in favor of the defendants" (record, folio 771).

The Supreme Court of Colorado sustained the court below in the giving said instruction numbered 24, and also held that there was some evidence contained in the record tending to show that defendants had performed annual labor for the year 1897 of the value of $100. And these two rulings of said Supreme Court furnish the ground for the eighth and ninth assignments of error in this Court (record, folio 771).

The trial Court refused instructions six and thirteen, asked by the plaintiff, which said instructions are as follows:

"6. Where the vein in controversy is a true fissure vein, it cannot be said to be a discovery until the shaft shows the existence of a fissure. A vein or lode authorized to be located is a crevice or fissure in the earth's crust containing rock in place carrying gold, silver or other valuable mineral deposits named in its statutes, and a crevice is an opening or fissure in the earth's crust; and before such crevice can be considered well defined, the opening or fissure must be so disclosed as that its existence can be established by proof, at the time when the discovery is claimed."

"13. The jury are instructed that the distinguishing characteristics of a fissure vein are the opening in the earth's crust in which mineral may be deposited, and the deposit of mineral itself. Where one of these features is clearly established, the other may be established by a less conclusive amount of proof. Where one wall of a vein is disclosed, and a body of mineral is found adjoining it, it may be presumed that there is somewhere another boundary or wall. But where no crevice and neither boundary of a crevice has been disclosed, the mere finding of country rock, that in one instance furnishes an assay, cannot be received as sufficient proof of the existence and discovery of a fissure vein."

The Supreme Court sustained these rulings, and its action in that regard is questioned by the tenth assignment of error.

In regard to the viewing of mining premises in controversy by a jury the statute of the State of Colorado provides:

"In all suits, actions and proceedings now pending or which may hereafter be brought, in any Court of this State, involving the title to, the right of possession of, or the mineral contained in any mine or mining claim, it shall be the duty of the Court, at the trial of such suit, upon the application of either party interested therein, to send the jury impannelled in the case, in a body, to

view and inspect the premises. Each party to the suit shall have the privilege of nominating one person, to be approved by the Court, to attend with the jury in their view and investigation of the premises in controversy, and such person or persons so selected and appointed by the Court shall be authorized to act as guide or guides to the jury, and to point out such features in the premises as it is desirable that the jury should see, and answer all questions propounded by the jury; but such person or persons so selected shall not be at liberty to argue or discuss any questions involved in the case either with the jury or with each other in the presence of the jury; and if such person or persons shall violate the above provision, the Court shall have the power to punish any one so offending, for contempt of Court, by a fine of not more than one hundred dollars or by imprisonment not to exceed ten days in the County jail."

As to this view the trial Court instructed the jury as follows:

"In reference to your visit to the premises in controversy, the Court instructs you that you are to go to the said premises accompanied by and under the charge of the bailiff appointed by the Court for such purpose.

Each party to the suit, under the statute, has the privilege of nominating one person, to be approved by the Court, to attend with the jury in your view and investigation of said premises.

Such persons so selected and appointed by the Court, who in this case are J. W. Carr, for the plaintiff, and James F. Smith, for the defendant, shall be authorized to act as guides to the jury and to point out to you such features in the premises as it is desirable that you should see and answer all questions touching the same propounded by you. Such guides, however, must not argue or discuss any questions involved in this case either with the jury or with each other in the presence of the jury, nor should you engage in any such discussion with them or either of them, nor should you permit any such discussion by them, nor should you talk with any person or allow any other person to talk with you about the case. These guides should be with you only while you are engaged in your view and investigation of the premises, and at no other time or place.

"The Court further instructs you that the object of your visit to, and examination of the premises in controversy therein, is to enable you to see for yourselves, and to examine for yourselves, the physical situation, condition and surroundings of the premises; hence, whatever you learn by such view and examination, is available to enable you to determine the weight of the conflicting testimony of the witnesses respecting the matter upon which they have testified, and to enable you thereby the better to understand and to comprehend the testimony of the witnesses respecting the issues involved herein concerning said premises, and your verdict must be based upon the evidence before the Court, thus the more intelligently applied by you from your view and examination of said premises. And you must not deliberate among yourselves, or discuss the case in any respect, or in any of its phases, until after you have returned from your view into open court, and sent by the Court to your jury-room to consider your verdict.

The Court wishes to impress upon the jury the necessity of strict observance and compliance by the jury, and also by the guides, in regard to the foregoing instructions, and in case of any attempt upon the part of the guides, or either of them, to violate their duty, as explained to you in these instructions, the jury or any member thereof must at once interpose and put a stop thereto and report to the Court any infraction or violation by the guides of their simple duty, as outlined to you in these instructions" (record, folios 772-773).

The Supreme Court sustained the trial Court in giving this last named instruction, and this ruling of the Supreme Court is assigned for error in this Court by our eleventh assignment (record, folio 772).

The assignments of error not heretofore mentioned in this statement are as follows:

12. That said Supreme Court erred in holding that the view of the premises need not be had by the entire jury acting as a body; and that such view need be participated in by such jurors only as those who, in their discretion, saw fit so to do.

13. The said Supreme Court erred in holding that the venire was properly ordered by the Court below; in sustaining the Court below in not granting a new trial because of irregularity in ordering said special venire and in not reversing the judgment because of such irregularity.

14. The said Supreme Court erred in holding that said special venire was not made use of by the Sheriff to pack a jury in said cause, and in not reversing said judgment by reason of this fact.

15. The said Supreme Court erred in holding that the conduct of one of the guides in making a survey and pointing out to the jury while viewing the premises the place where, as he claimed, the southwest corner post of the Tecumseh claim would fall by right, was not ground for a new trial.

16. The said Supreme Court erred in holding that the various separations of the jury while hearing the case, and after the submission of the same, as shown by the evidence, did not constitute a ground for a new trial.

17. The said Supreme Court erred in holding that the newly discovered testimony impeaching the credibility of the witness Smith did not furnish a ground for a new trial.

18. The said Supreme Court erred in holding that certain samples of rock offered in evidence, on rebuttal, and the testimony in relation thereto, were not rebutting evidence, and were properly excluded on this ground.

19. The said Supreme Court erred in holding that discoveries in shafts other than discovery shaft can not be taken into consideration for any purpose on the trial of an adverse suit.

20. The said Supreme Court erred in holding that there was evidence to support the verdict, in view of the facts:

First—That there was no evidence that a vein, within the meaning of the act of Congress, was discovered in the Ophir shaft prior to the discovery of such vein in the Tecumseh shafts.

Second—That there was no legal and competent evidence that labor and improvements of the value of $100 were made and performed on said Ophir claim for the year 1897.

21. That the said Supreme Court erred in holding that after a valid location has once been made, a locator need not per-

form any labor or make any improvements annually, in order to maintain his title as against the United States, or as against any one else who has not relocated the claim by reason of a forfeiture, and be entitled, in the adverse suit, to such a verdict and judgment as were rendered and entered in this cause.

22. That the said Supreme Court erred in holding that willful use of false testimony, and the manufacture of fictitious evidence by what is known as the 'salting' of the Ophir shaft, was not a ground of reversal of the judgment in said cause.

23. That the said Supreme Court erred in not reversing the judgment herein, instead of affirming the same" (record, folios 774-775).

As to each one of these assignments of error, from 12 to 23 inclusive, which we determine to specifically discuss, we will state the case in connection with such discussion.

A provision of the statutes of Colorado in relation to the relocation of mining claims reads as follows:

"If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an over-lapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefit of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act;

Provided—That such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location." (Mills' Stats., Sec. 3160.)

The act providing for District Courts with more than one Judge is as follows:

"SECTION 1. In any District Court composed of more than one Judge, each of said Judges shall sit separately for the trial of causes and the transaction of business, and shall have and exercise all the powers and functions, as well in vacation of Court as in term time, which he might have and exercise if he were the sole Judge of said Court.

SEC. 2. While so sitting separately, the Courts held by the several Judges, shall each of them be known as the District Court of the county wherein and wherefore such Court may be held, and shall have the same power to vacate or modify its own judgments, decrees or orders rendered or made while so held, as if the said Court were composed of a single Judge; *Provided*, that neither of said Judges shall have power to vacate or modifying a judgment, decree or order rendered or made by another Judge of the same Court.

SEC. 3. In any District Court composed of more than one Judge, the said Judges may sit in bank at such time as they may determine, for the purpose of making rules of Court, the appointment of a clerk, the approval of the appointments of deputies, the approval of official bonds and such like ministerial duties, but for no other purpose whatever; and the said Court so sitting in bank shall have no power to review any order, decision or proceeding of the Court held by any Judge sitting separately or of any Judge thereof.

SEC. 4. While sitting in bank, one of the Judges of said Court shall act as presiding Judge. At the first term of any such Court held after the taking effect of this act, the Judge oldest in years shall act as presiding Judge; at the next succeeding term the one next oldest in years shall so act, and thereafter they shall preside at the several succeeding terms alternately and in regular rotation, each during the period from the commencement of one term to the commencement of the next succeeding. But the Court may at any time change the rule of presiding, as its convenience may require.

SEC. 5. In addition to the ordinary power of making rules, such Court sitting in bank may make all rules, which its particular organization may require different from the ordinary course of practice and necessary to facilitate the transaction of business in the Courts held by the Judges sitting separately, and may, by rule, provide for the classification, arrangement and distribution of the business of the Court among the several Judges thereof. And each shall attend to the business of the Court assigned to him under such rule, and when not occupied with the business assigned to him, shall, so far as practicable, aid the other Judge or Judges, to which end cases may be sent from one Judge to another, as the individual Judges may agree and direct; *Provided*, That all rules for the government of the Courts held by the Judges sitting separately shall be the same before each of the Judges.

SEC. 6. The Clerk of any District Court, composed of more than one Judge, shall keep one record, in which shall be recorded only the proceedings of said Court in bank; the Judges sitting separately shall cause such minutes of their proceedings to be kept as may be deemed necessary or expedient; but nothing in this act shall be construed to authorize any change in the manner of keeping the records of the Court in civil actions, such as the "Register of Actions," the "Judgment Book," the "Judgment Docket," and the like, and there shall be only one set of such books kept for the District Court of any county.

SEC. 7. Jurors may be summoned and empaneled, for each of the Judges sitting separately, as though each was the sole Court; *Provided*, That no more than one grand jury for the District Court, shall sit in any one county at the same time, and the grand jury shall be empaneled, sworn and charged in, and report to such Court presided over by one of the Judges sitting separately, as the Judges shall among themselves agree, or as they may by rule provide." (Laws Colo., p. 260.)

BRIEF OF PLAINTIFF IN ERROR.

We will discuss some, and perhaps nearly all of the questions raised by the above statement and the assignments of error, somewhat in the order mentioned therein.

I.

Res Adjudicata.

In may be conceded that the mere fact that an adverse suit is provided for by act of Congress does not operate to give the Supreme Court of the United States jurisdiction to review every judgment of the highest Court of a state in such a cause. (Blackburn v. Portland Gold Mining Co., 175 U. S., 571; Shoshone Mining Co. v. Rutter, 177 U. S., 505.) In the Rutter case the Court said:

> **"So, we conclude, as we did in the prior case, that, although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal Courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the Statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal Courts."**

It may be true that many actions for possession, based upon adverse claims, may be tried without any Federal question arising; but, it is obvious that, in such a cause, such question is more likely to arise than in other causes. A compliance with the laws of the State and of the United States is the foundation of the right and title to a mining claim. In all cases where there is any dispute as to whether certain acts constitute such compliance with the laws of the United States, it is necessary,

in order to determine the question in controversy, to construe such laws of the United States and determine their meaning and intent.

The clause of the statute under which this case clearly falls, reads:

> **"Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."** (Rev. Stat. U. S., §§ 709, 1017.)

The defendants below, in their answer, alleged title to the Ophir lode by reason of having made a valid location on February 3, 1892. No work was done upon this lode from 1892 until 1895. One of the vital questions in the case was whether a shaft on this lode about twenty-five feet in depth, contained a valid discovery in 1892. If not, then no discovery was made upon the Ophir until 1895.

The plaintiff, in a replication which appears in the assignment of errors, alleged that defendants on February 10, 1893, made a mineral entry including the Ophir lode; that plaintiff, with others, filed protest on the ground that no discovery had been made; that a hearing was ordered and had on October 11, 1893; that upon appeal the Commissioner of the General Land Office found and adjudicated that there had been no discovery; that, on appeal to the Secretary of the Interior, he twice found and adjudicated that no discovery had been made; that these officers found and adjudicated that the Ophir shaft was, on October 11, 1893, only twenty-five feet deep, and that, in pursuance of these adjudica-

tions, said mineral entry was canceled. A demurrer was sustained to this replication.

A discovery was made in the Ophir shaft, in 1895, at a depth of thirty-four feet, but a valid discovery had been made on the Tecumseh lode, in three different shafts, more than a year before the discovery in the Ophir in 1895. Hence, it was necessary to go back to 1892, when the last work had been done prior to 1895, and attempt to show that a discovery had been made prior to October 11, 1893. This could only be done by disregarding the decisions of the Commissioner and the Secretary.

The Court below maintains that, as this is a second application for a patent, nothing that was adjudicated as to their first application has any materiality to the case. This might be true if they were relying only on a discovery made after October 11, 1893. Then their new application would make a new case. We do not rely on these adjudications as showing that they had not a discovery at the time of their new application. We simply plead these adjudications as *res adjudicata* of their claim that they had a discovery earlier than October 11, 1893. To attempt to show a discovery of an earlier date is to disregard and overthrow these adjudications. Can this be done?

The technical rules in regard to judgments do not apply to these decisions. Land officers' decisions are only of a *quasi* judicial character (United States v. Minor, 114 U. S., 233). It has been decided that where these officers grant a patent it will be assumed that they found that a discovery had been made, and that such finding is binding upon

the courts (Justice Min. Co. v. Lee, 21 Colo., 260). The same rule applies where an application for a patent is rejected because of a failure to comply with the law (Moore v. Robbins, 96 U. S., 530; Vance v. Burbank, 101 U. S., 514; Baldwin v. Stark, 107 U. S., 463; Lee v. Johnson, 116 U. S., 48; Sanford v. Sanford, 139 U. S., 642; Calhoun v. Violet, 173 U. S., 60; Acers v. Snyder, 58 Pac., 780; 8 Okl., 659; Wiseman v. Eastman, 21 Wash., 163; Paine v. Foster, 9 Ock., 257). Thus, a decision by the Land Department rejecting a person's claim to pre-empt certain land, upon evidence that he had previously exercised the pre-emption right, is binding and conclusive (Baldwin v. Stark, 107 U. S., 463). So, a finding by this Department that a homestead claimant to lands in Oklahoma, entered the Territory prior to the time fixed by the statute and the President's proclamation pursuant thereto (25 Stat., 980), is a finding of fact, which is not reviewable by the courts (Calhoun v. Violet, 173 U. S., 60).

The Court below also say that the cancellation of a mineral entry does not imply that the location is void, or fully adjudicate the possessory rights of the applicant. We have not suggested any such thing. We do not rely upon the mere cancellation of an entry. Back of such cancellation there was a *trial of a distinct issue of fact*, and an adjudication that appellees had *not made a discovery of a vein*. All we are asking is that this adjudication shall be respected. Suppose appellees, without doing any more development or attempting to make any further discovery, had made this second application for a patent, can there be any doubt that a court,

when these decisions were brought to its attention in an adverse proceeding, would be bound to instruct a jury that they were not entitled to the land in controversy? In an adverse proceeding each party must stand upon his own title. To make out his title he cannot be permitted to attack and overthrow adjudications of the Department as to a specific issue of fact. Our plea does not go to any rights the defendants in error may have by virtue of any other fact than the one expressly tried and determined.

But it is said that as appellant was a mere *protestant* in the Land Department, and not, as they claim, a technical party to the controversy, a court will pay no attention to these decisions. The protest was filed in order to protect the rights of appellant. He was permitted to appeal from the decision of the local land officers to the Commissioner of the General Land Office. Being a party in interest he *had the right of appeal* (Bright v. Elkhorn Co., 8 Land Dec., 122; *In re*, Nevada Lode, 16 *Id.*, 532; Mor. Min. Rights (8th ed.), 381). He was, therefore, technically speaking, a party to the record.

But we do not admit that it is only a technical party who can take advantage of these decisions. Appellant holds in privity with the Government of the United States. He has acquired rights by virtue of a compliance with its laws. To protect those rights he has, in one of the modes provided by Congress, caused it to be adjudicated that defendants in error had not, prior to October 11, 1893, made a discovery of a vein in the Ophir shaft; and

it would be strange if he can not, to protect his same rights, invoke these decisions. Under the act of Congress requiring both parties to prove their title, and providing that a finding and judgment may go against both, we submit that it would be the duty of a court to enforce decisions of this character, affecting the title of either party to an adverse proceeding, whether they were specially pleaded or not.

The entire testimony of defendants in error was directed to showing that there was a discovery in the Ophir shaft made in 1892. That a discovery was made in 1895 in this shaft stood admitted. But to antedate this discovery in the Tecumseh, made in 1894, it was necessary to show a discovery in the twenty-five foot shaft of the Ophir which was passed upon by the Department. It must be constantly borne in mind that no work was done in the Ophir shaft from 1892 to 1895. If defendants had relied wholly on a discovery made in 1895, these decisions would have no application to the case. But when they undertake to put a discovery in this shaft antedating the time passed upon by the Department, they are attacking decisions which are unassailable in this manner; and this is clearly a Federal question.

II.

Estopped in Pais.

By another part of our replication we set up an estoppel *in pais*. It is set forth in full in the assignment of errors. The testimony of a witness may work an estoppel the same as any other rep-

resentation (Smith v. Chicago & N. W. Ry. Co., 73 N. W., 581; 104 Iowa, 147).

This testimony related to a material fact. It was not given as an opinion. Mr. Cone was supposed to know the fact before he testified to it. He had just examined this shaft. If he did not know whether there was a *vein* or a well-defined crevice in the shaft, he was grossly negligent to give the testimony he did, which would carry all the more weight in that it was against himself. Gross negligence supplies the place of want of knowledge (Griffith v. Wright, 6 Colo., 248; 11 Amer. & Eng. Enc. Law (2d ed.), p. 433).

The Court holds that plaintiff in error must have been ignorant of the truth in order to assert an estoppel. It is alleged that he was ignorant of the fact as they now allege it to be. He had never examined the shaft, and had no reason to doubt the truth of Cone's testimony. The appellees are presumed to have intended the natural and probable consequence of their act. The natural consequence of such testimony as that given by Mr. Cone would be to induce reliance and action upon it; but an actual intent that it should be relied upon, was not, under all the allegations of this plea, necessary in order to work an estoppel. For Mr. Cone to testify that he had no vein, and then remain silent with knowledge that appellant was expending between ten and fifteen thousand dollars on the faith of such testimony, and thereafter be permitted to say his testimony was either false or mistaken, would work a fraud on the party setting up the estoppel in this case. These facts, all of

which are distinctly alleged, supply the place of actual intent (Griffith v. Wright, 6 Colo., 248). That this testimony would naturally induce credence is evident from the fact that the decisions of the Commissioner and Secretary were largely based thereon (record, folios 721-743).

The Court placed its original decision on the ground that the plea does not directly allege that the statement relied upon to constitute the estoppel was made with the *intention that it should be acted upon*, and cites Patterson v. Hitchcock (3 Colo., 533), to support its position. In the case cited the Court says:

"The fourth is true with the qualification that gross and culpable negligence upon the part of the party sought to be estopped, the effect of which is to work a fraud on the party setting up the estoppel, *supplies the place of intent.*"

This qualification of the general rule in regard to intention is again recognized in Griffith v. Wright (6 Colo., 248), and in Birch v. Streppler, (11 Colo., 400). We submit that our plea meets the rule as thus qualified.

The Court does not, in its opinion, state the substance of the entire plea. It alleges that defendants knew at all times that plaintiff was making the expenditures on the faith of the truth of the testimony, which was relied upon as a ground of estoppel and never contradicted the same; and that to permit the defendants to now dispute the truth of said testimony would work a fraud on plaintiff. It is not alleged, in express terms, that defendant was guilty of gross and culpable negligence. Such an allegation is not necessary where facts are

alleged from which gross and culpable negligence must be inferred.

Mr. Estee (2 Pl., Sec. 2010, 4th ed.,) states the rule as follows:

"Negligence is a question of fact, or mixed law and fact and in pleading it has been held only necessary to aver negligence generally, not the specific facts constituting negligence. It is always safer, however, to allege the facts constituting the negligence. And where the negligence consists in the omission of a duty, the facts which are relied on must be alleged."

We know of no authority to the effect that where the specific facts showing the negligence are alleged, there must, also, be a general allegation of negligence. We submit that it is morally and rationally impossible for any court to declare, as a question of law, that it is not grossly and culpably negligent for a man who has testified to a fact to stand by and see another man expend a large sum of money with full knowledge that he is doing so on the faith of the truth of such testimony, and not give him notice that his testimony was erroneous. To do this, and then dispute his former testimony, with the view and effect of taking the benefit of such expenditure, is a fraud that no court of conscience can tolerate.

We have presented this question with great doubt as to whether the same is a Federal question. As this testimony was given in a Federal tribunal, acting under the laws of the United States, and with reference to property of the United States, it would seem to be proper that the Federal courts should adjudicate with reference to the force and effect thereof upon the parties thereto; but, as to whether this is correct we are in doubt.

III.

Decisions of the Secretary.

The decisions of the Secretary of the Interior were admissible as evidence. (Kreckeler v. Ritter, 62 N. Y., 372; Taylor v. Field, 22 Ill. App., 436; Sauce v. Shaughnessy, 33 N. Y. Sup., 517; Babcock v. Kemp, 12 Ohio St., 11.)

The State Courts are bound by these decisions. (Carr v. Fife, 44 Fed., 713; Aurora Hill Con. Min. Co. v. 85 Mining Co., 34 Fed., 515; Marquez v. Frisbie, 101 U. S. Rep., 473; Smelting Co. v. Kemp, 104 U. S., 636; Quinby v. Conlan, 104 U. S., 420; Steel v. Smelting Co., 106 U. S., 447; Parsons v. Venzke, 61 N. W., 1036; Shepley v. Cowan, 91 U. S., 330; United States v. Minon, 114 U. S., 233; Bauldwin v. Stark, 107 U. S., 463; Vance v. Burbank, 101 U. S., 514; Heath v. Wallace, 138 U. S. 573; Lee v. Johnson, 116 U. S., 48; Mineral Law Digest, 445; Justice Mining Co. v. Lee, 21 Colo., 260.)

If these decisions were competent for any purpose they should have been admitted in evidence, and their *effect* controlled by proper instructions. The courts have held that, in an adverse suit, a party, in order to make out a *prima facie* case, must show that he has made a valid location on the unoccupied public domain. (Becker v. Pugh, 9 Colo., 589; Bryan v. McCaig, 10 Colo., 309; Girard v. Carson, 22 Colo., 345.) When the Secretary of the Interior adjudicated that defendants in error had not, on October 11, 1893, made any discovery, he established the *status* of this ground upon that day. It

was thereby declared that the same was a part of the public domain. What better authority could any citizen of the United States have to enter upon a part of the supposed public domain than these decisions?

The Secretary, in his first decision, said:

"Cone admits, in answer to a direct question on cross-examination, that no vein has been discovered in the Ophir. Counsel for claimants presents an elaborate argument with the view of showing that the character of the alleged discovery of mineral is sufficient upon which to base a valid location in that mining district, and enters into a long discussion of the meaning applied by the courts to the term vein. I do not deem it necessary to go into a discussion on this subject in the case at bar. It is sufficient to say there must be a discovery of a vein or lode of quartz or other rock in place bearing gold, silver, etc., in order to make a location of or secure a patent for public lands under the mining statutes." (Record, folio 250.)

And the Secretary, upon a petition for rehearing, said:

"But I think it may with propriety be said that Section 2320 (Revised Statutes) specifically provides that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.' Section 2401 (General Statutes of Colorado), in defining what shall be done to make a mining location, says: 'A discovery shaft (shall be sunk) upon the *lode* to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.' The charge here was that there had been 'no discovery of any lode, vein, ledge or deposit,' and in the notice issued this charge was copied. This is the issue, therefore, the lode claimants were required to meet. The defendant, Cone, admitted on the stand that there was no vein in the Ophir and there was no attempt made to show that any other form of deposit existed, except that by an assay certificate it was shown that mineral was found of the value of $4.50 per ton. By another certificate, how-

ever, introduced by the protestants, it is shown that there was no mineral in the specimen that he had assayed. But whatever might be the conclusion from the evidence, it cannot be controverted that there was no evidence to show that the location had been made in conformity with the statutory requirements" (record, folio 255).

In German Ins. Co. v. Hayden (21 Colo., 127), the Court, in holding that a decision of the Land Department, made upon a protest, established the status of the land in question, and that a third party, in no way connected with the cause, could take advantage of such decision, said:

"In the present instance, the title failed by reason of an inherent infirmity—the land not being mineral land, and consequently not open to entry under the mining laws of the United States. The character of this land was a question of fact, the determination of which is specially committed to the appropriate officers of the Land Department of the government, and their decision in all cases within their jurisdiction is final and conclusive, in the absence of fraud. Lindsey v. Hawes, 2 Black., 554; Lee v. Johnson, 116 U. S., 48; Vance v. Burbank, 101 U. S., 514. It is claimed, however, in this case, that the land officers were acting without jurisdiction. This claim is based upon the assumption that a protestant has no right of appeal, and upon a further claim that by the protest filed, only a small portion of the placer claim was involved, the buildings not being upon such portion. The answer to this claim will be found in the statutes. By section 2329 of the Revised Statutes of the United States it is provided that a placer claim is 'subject to entry and patent under like circumstances and conditions and upon proceedings as are provided for vein or lode claims.' In section 2325 provision is made with reference to lode claims as follows: 'If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and there-

after no objection from third parties to the issuance of a patent shall be heard, '*except it may be shown that the applicant has failed to comply with the terms of this chapter.*' The standing of the protestants seems to be regulated by the exception in the paragraph last quoted. The statement that he is not a party and therefore not entitled to appeal is immaterial to the real question at issue."

We think there can be no question but that it is the province of this Court to determine whether these decisions are admissible in evidence to show that this ground, on October 11, 1893, was open to location.

IV.

Original Certificate of Location.

The Court erred in holding that the original certificate of location was properly excluded.

Mr. Morrison (Mining Rights, p. 26) says:

"If a location be made before discovery, but is followed by a discovery in the discovery shaft, before any adverse rights intervene, such subsequent discovery cures the original defect, and the claim is valid."

In Strepey v. Stark (7 Colo., 614), the Court said:

"It has been held by the United States Circuit Court of Colorado, that though the locator of a mining claim may not have sunk his shaft to the discovery of mineral in place, prior to filing his location certificate, yet if he shall thereafter so sink the shaft and discover the lode, he will hold as against all who had not theretofore acquired an interest in the lode, the same as if he had uncovered it before the survey and filing the certificate, such discovery relating back to the location (Zollars, etc., v. Evans, 2 McCrary, 39). * * * And even when the certificate, for any of the reasons set forth in the statute, is deemed void, it has been held admissible, in connection with a valid amended certificate cor-

recting the defects of the original" (Van Zant v. Argentine M. Co., 2 McCrary, 159).

In 15 Amer. & Eng. Ency. Law, p. 529, it is said:

"Though at the time of location a shaft has not been sunk to a discovery of mineral in place, yet if this is done afterwards, and before the rights of others had attached, the discovery will relate back to the location."

The author cites a large number of authorities to this point.

This question is decided by the statute which provides that if a locator shall apprehend that his original certificate was defective, *or that the requirements of the law had not been complied with before filing*, or shall be desirous of changing his boundaries, or of taking in any part of an overlapping claim which has been abandoned, he may file an additional certificate, provided that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or *other record thereof*, shall preclude the claimant or claimants *from proving any such title or titles as he or they may have held under previous location* (2 Mills', Sec. 3160).

Our original location certificate was excluded solely on the ground that shortly after making a discovery we filed an additional certificate. The claim in both certificates was the same, with the exception that the boundaries were somewhat changed. It was not necessary to the validity of the claim that this additional certificate should have been filed, for the discovery would, as we

have seen, relate back to the filing of the original certificate.

If we are not correct in regard to this *doctrine of relation*, then the defendants never did have a valid claim. There can be no pretense that they had any discovery at the time their certificate of location under which they hold was filed. Their certificate was filed upon a shaft that was scant ten feet deep, and there is no claim that it contained any discovery. The trial Court, in instruction 22 (record, folio 633), says:

"It is admitted by the defendants that on the third day of February, 1892, no discovery of any vein had then been made in the Ophir discovery shaft."

Cone and Robinson purchased this claim after it had been located. They sunk the shaft from a depth of ten feet to the depth that it stood at until 1895. This was done in 1892. They never filed any additional certificate. If they had to have a discovery before location, then their claim is *void*. They are *absolutely dependent* on the doctrine of relation.

The defendants claim that, as we had no discovery at the time of our original location, and, as our additional location was defective in that the southwest corner post was not properly placed and marked, therefore we have no valid location at all. In pursuance of this claim they got the Court below to exclude our original certificate, and then they proceed to demolish our additional location. The only effect, according to their contention, of filing our additional certificate, was to forfeit our

claim. The first part of their contention was sustained by the Court below by excluding our original certificate, and the jury were given the discretion to sustain the last part of such contention. This was all in plain and palpable violation of the statute above quoted. We had the legal right to introduce both certificates, and rely on any title that was conferred by either. To such extent as the boundaries were changed, our rights may have changed, dependent on whether we recovered under and by virtue of title conferred by one certificate or the other; but we submit that this Court can not hold that, by filing an additional certificate of location for the same claim, we abandoned or forfeited all right to our claim, which we derived from our original location, followed by three distinct discoveries, two of which stood undisputed.

There has been no contention but that our original location of the Tecumseh was a valid location, with the single qualification that no discovery had been made at the time of location. When a discovery was made it related back to the original location. Then an additional certificate was filed changing the boundaries and the discovery shaft. Now, if some post was not properly located or marked, and for this reason the relocation was imperfect, to the full extent and boundaries of the claim as relocated, we certainly did not abandon or forfeit our rights, derived from the original location, to such part of the ground in conflict as was embraced within the original location certificate. We submit that the effect of this decision is to nullify the statute on the subject.

We desire to cite a few additional authorities to sustain the proposition that by making an additional location we did not abandon any rights we may have had under our original location; and that both location certificates should have been admitted in evidence. Since the decision in this cause was rendered the Court of Appeals of Colorado, in Duncan v. Fulton (3 Legal Adviser, 520), has adjudicated that, under circumstances not distinguishable from those in this case, both certificates were admissible in evidence. This is in harmony with the former decisions of the Supreme Court (Strepy v. Stark, 7 Colo., 614; Frisholm v. Fitzgerald, 25 Colo., 290). The Court below, in the case at bar, held that we could take nothing from our original certificate of location for the reason that we did not have a discovery at the time it was made, and that our subsequent discovery could not be made to relate back, for any purpose, to the time of our original location. In Erwin v. Perego (93 Fed., 608; 35 C. C. A., 482), the United States Circuit Court of Appeals of this circuit said:

"The order in which the statutory requirement for securing a lode mining claim are complied with is immaterial, so long as the rights of others do not intervene before they are complied with. The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earliest act will inure to the benefit of the locator as of the date of the latter, and a complete possessory title to the premises will rest in him as of the latter date. * * * This conclusion is decisive of the case. The location of 1889 insured to the benefit of Perego as of the date of his subsequent discovery in 1890, and vested in him and his grantee the right to the possession of the property in dispute from the latter date."

The Court in the above cause, cites a large number of authorities upon this point, including Thompson v. Spray (72 Cal., 528), and Erhart v. Boaro (113 U. S., 527). The same principle is adjudicated in Nevada Sierra Oil Co. v. Home Oil Co., (98 Fed., 673).

We do not think there can be any shadow of doubt but that a discovery relates back to the original location made without any discovery, and validates the location, in the absence of intervening rights, and even without any additional location, as of the date of the discovery. In other words, and applying the principle to the facts of this case, if we made a discovery in 1894, within the limits of the original Tecumseh claim, and before defendants made any discovery in the Ophir claim, and then we made an additional location on the new discovery, this operated to validate the old location of the Tecumseh, as to all ground embraced therein, even though the new location, because of a defect in the southwest corner stake, was not a valid location of the additional ground taken in by and through the new location. The position of defendants on the trial was that by making a new location we abandoned our rights under the original location, and that by failing to put our southwest corner post at the right point, our new location, or additional location, was invalid; and, hence, we lost our entire claim, notwithstanding we made the first discovery. By the additional location the claim located was the same; the name was the same; the right was the same. It is true that the relocation was made in the name of Dr. Beals alone, while

the old claim was located by two other parties and himself; but this was done for convenience, and he holds the interest of the other parties in trust for them as fully shown by the evidence. A change of the name of the claim would not have affected the right of the parties (Shoshone Min. Co. v. Rutter, 87 Fed., 801; 31 C. C. A., 223).

V.

What Is a Vein?

We claimed title to the land in controversy on the ground that the Ophir discovery shaft (and this was the only shaft on the Ophir) did not, at the depth of twenty-five feet, disclose a vein within the meaning of the act of Congress. A vein was disclosed in this shaft at the depth of thirty-four feet, but this was not done until 1895. This discovery in 1895 was of no avail because of the discoveries in the Tecumseh in the spring of 1894. It was necessary to go back of 1894, and inject into the Ophir shaft a vein the discovery of which antedated the hearing in the Land Department. This had to be done and was permitted to be done upon evidence that showed no fissure, no crevice, no walls of a vein, no wall of a vein, and nothing (even as claimed by defendants in error), but an *impregnation*.

The plain declaration of the act of Congress is that no location shall be made until the discovery of a vein within the limits of a claim. The exact *place* of the vein, and its relation to the boundaries of the claim, are not so material. All that is required is that it shall be discovered within the *limits* of the claim. But as to *what* shall be dis-

covered the act is peremptory. Indications of the proximity of a vein are not sufficient. The vein itself must be discovered. There have been many judicial and scientific definitions of veins. We will quote a few of them:

"A vein is an 'aggregation of mineral matter in fissures of rock.'" (Bainbridge on Mines, p. 2.)

"The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineral matter, or more accurately, an aggregation of mineral matter, containing ores in fissures." (Van Cotta 26.)

"A lode is a mineral body in the general mass of the mountain" (Iron Silver M. Co. v. Cheeseman, 2 McCary, 191; 9 Mor. Min. Rep., 552.)

"The terms 'vein,' 'lode' and 'ledge' are supposed to be nearly synonymous, and mean a continuous body of mineral-bearing rock within defined boundaries in the general mass of the mountain." (*Id.*)

"A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some other rock in place carrying gold, silver or other mineral deposits named in the statute." (North Noonday M. Co. v. Orient M. Co., 1 Fed., 522; Iron Silver M. Co. v. Cheeseman, 116 U. S., 529.)

"A vein or lode is 'any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.'" (Iron Silver M. Co. v. Cheeseman, 116 U. S., 529).

"To constitute a vein 'something must be found in place, as rock, clay or earth, so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the inclosing country.'" (Burke v. McDonald, 2 Ida., 646; 33 Pac., 49.)

"A lode or vein is a body of mineral or mineral-bearing rock, within defined boundaries, in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock, and the boundaries. With either of these

things established, very slight evidence may be accepted as to the existence of the other." (Hyman v. Wheeler, 29 Fed., 347.)

"By 'veins or lodes' * * * are meant lines or aggregations of metal imbedded in quartz or other rock in place." (United States v. Iron Silver M. Co., 128 U. S., 673.)

"A vein or lode authorised to be located is a seam or fissure in the earth's crust, filled with quartz or some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statute. * * * It must be more than detached pieces of quartz or mere bunches of quartz not in place." (Jupiter M. Co. v. Bodie Con M. Co., 11 Fed., 666.)

"A vein is 'any zone or belt of mineral rock lying within boundaries clearly separating it from neighboring rock.'" (Cheeseman v. Shreeve, 40 Fed., 787.)

"Ore disseminated at intervals or found in channels, chutes, cavities, pockets or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode or vein within the meaning of the statute." (Cheeseman v. Shreeve, 40 Fed., 787.)

"In general, it may be said that a lode or vein is a body of mineral—body of rock, within defined boundaries, in the general mass of the mountain." (Stevens v. Williams, 1 McCrary, 480; approved in Iron Silver M. Co. v. Cheeseman, 116 U. S., 529.)

"A vein is defined as a 'lead or lode of ore-bearing rock, alive or dead—that is, containing ore or not,' and as a 'seam of metalliferous matter filling up a former fissure in rock." (4 Enc. Dic., title vein.)

"The thinner portions (of veins) often branch off into innummerable slender ramifications like the veins of an animal, whence their name." (*Id.*)

"The Act of Congress declares that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." (Min. Law Dig., p. 2.)

"The object of this provision is to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists." (*Id.*)

"Under our State statute, a discovery shaft must be sunk ten feet deep, and deeper 'if necessary, to show a well-defined crevice.' "

"While the discovery shaft must reach a well-defined crevice, the mineral-bearing vein may be found anywhere on the claim." (Min. Law Dig., p. 410; Wight v. Tabor, 2 L. D., 741.)

"A location can only rest upon an actual discovery of the vein or lode." (King v. Amy & Silversmith M. Co., 152 U. S., 222.) "A location, without a discovery, does not segregate the territory from the public domain." (Armstrong v. Lower, 6 Colo., 393; affirmed 6 Colo., 581; Johnson v. Young, 18 *Id.*, 628.)

"Evidence of a discovery must be clear and positive. (Min. Law Dig., p. 410; Robert S. Hale, 3 L. D., 536; Silver Tennie lode, 7 L. D., 6.) Must show all the details of a location, such as notices, posts, stakes, etc. (Becker v. Pugh, 17 Colo., 243.) Must prove compliance with State and Federal statutes and miner's rules and regulations. (Becker v. Pugh, 9 Colo., 589.) Defendants must prove all the elements essential to title. (Bryan v. McCaig, 10 Colo., 309; Min. Law Dig., p. 408.) Certificate of location does not establish discovery. (Min. Law Dig., p. 404.) Failure to prove citizenship is fatal. (O'Reilly v. Campbell, 116 U. S., 418.) Affidavits of annual labor are admissible. (McGinnis v. Egbert, 8 Colo., 41.) The testimony of Cone may be used against defendants. (Clayton v. Clayton, 4 Colo., 417; Budde v. Spangler, 12 *Id.*, 216, 223.) But there is no question of burden of proof in the case." (Becker v. Pugh, 17 Colo., 242.)

The vein in the Ophir shaft, when discovered in 1895, at the depth of 34 feet, was a well-defined fissure vein. There was no necessity for appealing to any of the loose definitions or strained constructions that are sometimes employed with reference to blanket veins or irregular deposits of mineral. No work had been done between 1892 and 1895. In 1895, the vein was clearly disclosed by sinking the Ophir shaft from the depth of 25 feet, a depth reached in 1892 (at which point it was examined

and passed upon by the Land Department as of October 11, 1893), to a depth of 34 feet. The vein was approached on its dip. The hanging wall was first reached.

Now, in order to antedate the several discoveries made in the Tecumseh in 1894 (fully a year before this vein was reached in the Ophir in 1895), it was necessary to travel through 9 feet of country rock, and carry this vein up to a point within 25 feet of the surface. Cone had testified in 1893, before the Land Office, that there was no vein in the Ophir. He further said that if there was anything in the Ophir shaft that looked like a vein, or that might develop into a vein, it was a slip in a certain corner of the shaft. This slip turned out to be nothing but a slip, and when, in 1895, the vein was uncovered it was in a corner diagonally across the shaft from where this supposed *slip* was said to be. So that, if any vein had been reached in the Ophir, prior to 1895, no one knew it or claimed it.

But in order to defeat the Tecumseh it became necessary to trace this vein in the shaft up to where work stopped in 1892. It is not material to the point we are now making to show how this was done; how they utilized perjury; how they packed a jury; how they "salted" the Ophir shaft; how, in short, they stole this mine, if, indeed, this verdict and judgment shall be permitted to stand. It is sufficient, for the purpose now in view, to say that on all the evidence in the case, on their own evidence, and on the evidence of any one of their own witnesses, no crevice had been disclosed, no

wall of a vein had been reached, and no point had been reached which, upon future development, was shown to have been within the walls or boundaries of a vein. The act of Congress was, when properly construed, actually ignored.

It was not claimed by the defendants that prior to 1895, any actual well-defined crevice was disclosed in the Ophir discovery shaft. It is sought to maintain their alleged discovery upon the theory that this shaft was at that time sunk near such a crevice; that the country rock was somewhat impregnated with mineral from such crevice, and that this impregnation reached into the shaft. The theory upon which the Court refused instructions, and gave instructions to the jury, was that the discovery of this impregnation, which might or might not be in close proximity to a crevice, amounted, in contemplation of law, to a discovery of the crevice itself. We do not understand this to be the law. (Strepey v. Stark, 7 Colo., 618; Bryan v. McCaig, 10 Colo., 313; Van Zandt v. Argentine Mining Co., 8 Fed., 727.) The instructions given by the Court, taken in connection with the refusal of the instructions asked by plaintiff, operated as an absolute nullification of both the State statute and the act of Congress. To say that the discovery of a mere impregnation, that is years afterwards shown to have been in proximity to a crevice, is the discovery of a well-defined crevice, is to disregard both the ordinary and technical meaning of the language of the statute, and to ignore the purpose for which the statute was made. One of the purposes of this statute

was to enable the prospector, by examining the shaft, to see whether anything had been done that amounted to an appropriation of a part of the public domain. If a well defined crevice appeared in a shaft, any miner or prospector could see it. This would clearly put him upon further inquiry to ascertain whether or not this crevice contained a mineral-bearing vein. But where a shaft only twenty-five feet deep contains no crevice, he is not to suppose that any discovery has been made for the reason that the first and most important requirement of the statute has not been complied with.

The charge of the Court was quite lengthy, and amounted to quite a treatise on mining law in general. Many of its propositions were purely abstract in their nature, and had really no application to the evidence concerning either the Tecumseh or the Ophir lode. The instructions in mining cases should apply to the particular formations as shown by the evidence. (Book v. Justice Mining Co., 58 Fed., 106; Hyman v. Wheeler, 29 Fed. 347). All of the evidence in this case shows that the veins in controversy, and indeed all the veins in the neighborhood of these properties, were *true fissure veins*, and yet the Court entered into a full discussion of the law as applicable to blanket veins, deposits and all other formations where mineral is sometimes found.

We call attention to the third instruction given by the Court. The Court states:

"While the vein must be found in rock in place, that is, separated by defined boundaries from the general mass of the moun-

tain, it is not necessary that it should have these characteristics at the surface, or that it should be theoretically perfect in all respects as to all these characteristics. If the vein in continuing down passes or is included within walls of rock in place, it is a sufficient discovery if it is sufficient in other particulars—that is, containing mineralized rock bearing appreciable quantities of precious metal. Theoretically a vein must have two walls which clearly separate it from the general mass of the mountain; but for the purposes of this case you are instructed that if there is a body of mineralized rock containing appreciable quantities of some of the metals, and it is found in place, it is not necessary that it should have two well-defined walls. It is for practical purposes a vein if the mineralized body of rock or the body of mineral is found in the general mass of the mountain, and if it continues unbroken and without interruption it is regarded as a vein whatever the boundaries may be, and if it contains such a showing of mineral in connection therewith as that a competent miner would be willing to follow it in prospecting in the expectation of reaching thereby richer or larger quantities of ore beyond."

This instruction was intended to apply to both the Tecumseh and Ophir lodes. It was not specially directed to either. An examination of the evidence will show that there were well-defined fissures in three different shafts on the Tecumseh lode in the spring of 1894. The only serious question as to the Tecumseh lode was as to whether these fissures as disclosed in the discovery shaft were mineral bearing. All of the witnesses on the part of the defendants agreed that if these fissures bore mineral in appreciable quantities, they would be veins. On the other hand, the evidence was clear and certain that there was no fissure disclosed in the Ophir shaft until the summer of 1895. Up to the summer of 1895 the Ophir shaft was from 25 to 28 feet deep. The

great bulk of the testimony showed it to be about 25 feet deep, while the utmost claim of any witness for the defendants was for a depth of 28 feet. It was claimed by no witness for the defendants that there was a well-defined crevice disclosed in the Ophir shaft. The claim, and the only claim that was made, as we have heretofore stated, was that there was an impregnation that extended into the shaft from the upper side of the vein that was subsequently shown to be in close proximity to the shaft. This third instruction was not applicable to this state of facts. The Court declares that it is not necessary to a discovery that two well-defined walls are found, but here no wall had been found, and subsequent development shows that at the depth of twenty-five or twenty-eight feet from the surface the Ophir shaft must have been two or three feet distant from the hanging wall of the vein, even if such vein continues on its regular dip up to a point on a level with the bottom of the Ophir shaft as it stood prior to 1895. When this vein was reached, at a depth of 34 feet it was discovered to be a true fissure vein with two well-defined walls. It was not necessary to give any instructions that could be applied to the Ophir shaft except such as distinctly applied to a true fissure vein. The question was as to whether this fissure vein had been discovered in 1892 in the Ophir shaft, for it stood admitted that no work had been done upon this shaft from 1892, to the summer of 1895. The simple question was as to whether the discovery that country rock was somewhat impregnated with mineral and which by explorations

three years afterwards was found to be within a few feet of the fissure, amounted in law to a discovery of that fissure. The shaft itself did not disclose the fissure. Upon the hearing before the Land Office, Mr. Cone, one of the defendants, was claiming that a slip in the porphyry upon the other side of the shaft was or might possibly be afterwards shown to be a fissure. This was their claim as to this shaft until the summer of 1895, when, the shaft being sunk to a depth of thirty-four feet, the crevice was broken into and from this point down to the bottom of the shaft a well-defined crevice was disclosed. This third instruction, read in the light of the evidence, was clearly intended to allow the jury to find for the defendants wholly irrespective of the existence of any well-defined crevice or any crevice of any kind in the Ophir shaft. The evidence showed that these impregnations of country rock are very often found at great distances from any vein and sometimes irrespective of any vein. To say that a discovery of an impregnation or of country rock somewhat impregnated with mineral is the discovery of a fissure that exists in one direction or the other and at an uncertain distance from the shaft is to render the statute which requires the discovery of a well-defined fissure entirely nugatory. The question was whether a vein or well-defined crevice was disclosed and discovered in the Ophir shaft in 1892. It is well settled that this discovery can not be established by developments made three years later and after the discovery had

been made in the Tecumseh (Upton v. Larkin, 7 Mont., 449; s. c., 5 Mont., 600).

The same erroneous view of the law appears throughout the succeeding instructions. In the fourth instruction the Court said:

"And in this connection in this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode or vein, whatever the boundaries may be. On the other hand, with well defined boundaries, very slight evidence of such mineral would be sufficient to establish the existence of a lode. Such boundaries constitute a fissure, and if in such fissure mineral is found, although in small quantities, it may be called a lode or vein."

This instruction is not applicable to any state of facts found in the Ophir shaft prior to the discovery in the Tecumseh. No witness on either side of the cause undertook to establish by assay or any other test that there was any body of mineral in the Ophir shaft prior to the resumption of work in 1895, that continued unbroken and without interruption for any distance or in any direction. In declaring that well-defined boundaries would constitute a fissure, the Court wholly ignores the question as to the nature of those boundaries or as to how such boundaries are ascertainable. This instruction was construed, and was intended to be construed, as authorizing well-defined boundaries to be established by assays alone. As applicable to the Ophir shaft, it authorized the jury to ascertain and determine that a

vein existed in the same if any country rock found in that shaft would assay to any appreciable value. The evidence in this case tended to show that frequently the country rock in places would give an appreciable assay without being distinguishable by the naked eye from the balance of such country rock which would not assay. These instructions, taken as a whole, went upon the theory that the discovery of country rock which would assay was the discovery and disclosure of a well-defined fissure. While the boundaries could not be seen, the assay would give rise to the presumption that there were boundaries according to these instructions, and these presumptive boundaries are made to create the fissure, and the fissure is again conclusively presumed to be a well-defined fissure. By the fifth instruction the Court expressly authorizes this well-defined fissure contemplated by the statute to be one that is discoverable alone by assays. But there is not a *scintilla* of evidence in this case that, prior to 1895, there was any body of mineral in the Ophir shaft that had been or could be established by showing the difference between the walls and the mineral-bearing rock by assays or otherwise. Indeed, subsequent developments show that the shaft was entirely to one side of the vein that subsequently appeared therein. The shaft had not reached any point disclosing either, much less both of the boundaries of the vein. Hence, such boundaries could not be discoverable in that shaft by assay or in any other manner.

By the sixth instruction the jury was told that:

"'A continuous body of mineral or mineral-bearing rock, extending through loose, disjointed rocks, is a lode as fully as that which is found in the more regular formations."

This we think was erroneous. (Waterloo Co. v. Doe, 56 Fed., 685.)

In this connection, we may as well notice the sixteenth instruction, which reads as follows:

"The term 'well-defined crevice' as used in the statute, is intended to mean a vein or lode or ledge of mineral-bearing rock between walls. In its practical application, however, it must be considered in connection with the character of the mineral deposit which is the subject of location. If the lode is very wide or is horizontal, or exists with boundaries ascertainable by assay or analyses, then a discovery shaft sunk into of upon or through the same at a distance of ten feet or more below the surface is, in effect, the exposure of such a well-defined crevice as the law requires, for, were it otherwise, many metalliferous ores or deposits could not be located or appropriated at all."

This instruction was wholly inapplicable to either of the lodes in controversy. The Tecumseh lode had well-defined, visible crevices, and the only question was whether they were mineral-bearing or not. The Ophir lode when found at a depth of 34 feet, was a well-defined crevice. But the question for the jury to determine was whether it was found in 1892 or only in 1895, after the discovery in the Tecumseh. There was no necessity or propriety in instructing the jury as to those classes of metalliferous lodes which do not contain crevices or veins proper. If there was anything discovered on either of these lodes in controversy, it was a well-defined, true fissure vein, and the sole question for

the jury to determine as to the Ophir lode was whether that kind of a vein was disclosed in the Ophir shaft prior to the same kind of a vein being disclosed in the Tecumseh shaft. The instruction should have been directed to and based upon the facts as they were disclosed in these different shafts. This instruction permitted the jury, by applying exceptional doctrines that of necessity are employed in aid of the letter of the law to such lodes as do not come within such letter, to find that a well-defined crevice within the meaning of our State statute, and a vein within the meaning of the act of Congress, was found in the Ophir shaft in 1892, notwithstanding all of the evidence demonstrated that the thing in controversy was a well-defined visible crevice, and that the same was not disclosed until 1895.

We think we have shown that the entire theory upon which the cause was tried, insofar as it affected the Ophir shaft, was one that was wholly inconsistent with the act of Congress which requires a vein to be discovered before a location can be or become a valid one. A Federal question therefore arises. It is immaterial, as affecting the jurisdiction of this Court, as to how, or at what stage of a cause, such question arises. A defense based upon laws of the United States gives rise to a Federal question as much as a claim asserted in a complaint. (Anderson v. Clarkins, 135 U. S., 483; Murdock v. Memphis, 20 Wall., 590.) Where one party is a pre-emptor and the other a railroad acting under an act of Congress, a Federal case arises. (Spokane Falls, etc., R. R. Co. v. Zeigler,

167 U. S., 65; Florida, etc., R. R. Co. v. Bell, 87 Fed., 369.)

In the case at bar both parties claim the same parcel of the public domain of the United States, by virtue of a compliance with the laws of the United States and the State of Colorado. Insofar as a question fairly arises as to whether either party has complied with the laws of the United States a Federal question is necessarily presented. This would seem to be plain and certain for the simple reason that in order to determine any such question the laws of the United States must be construed and their meaning and intent ascertained and declared.

VI.

The Southwest Corner Post.

The Court erred in the conclusion at which it arrived respecting this post and the instructions given by the Court in regard to it. The evidence was uncertain whether this post, if it had been placed where it fell by right, would have been on the roadbed or on one of the slopes of the embankment.

Charles McNutt, the surveyor who set the post, testified:

"Corner No. 4 is a witness corner—a stone 40 inches long, by 7x8 inches square, set 20 inches in the ground, chiseled W. C. 4 over 9005. I did not set that stone exactly at the corner for the reason that it was on the roadbed. It was inaccessible for the establishment of a permanent corner. The embankment was 12 or 15 feet high. This corner stone, if set upon the roadbed, would have interfered with the road in running its trains, and if set upon the embankment would not have lasted. I say in the survey of

location which I made 'on the roadbed,' but I do not remember whether it would have been on the track or outside of the rails. I knew that it was unsuitable or I would not have called for a witness corner" (record, folios 269, 270 and 276).

On cross-examination he testified:

"I could have put a corner at the proper place, but it would not have lasted. The proper corner either came between the rails or on the slope. If on the slope, the natural shaking down of the embankment by the passage of trains and rolling material would have disturbed it. A true corner would have fallen either on the roadbed or on the embankment. The embankments were precipitous ground" (record, folios 273, 274).

J. W. Carr testified:

Just beyond where corner No. 4 would of right have come, a trestle commences and there is an embankment up to this trestle. This embankment is 10 to 15 feet high. This witness corner could not have been placed any nearer the true corner than it was without coming upon the embankment. It was not practicable to place this corner stone at the true corner. I do not know exactly where this corner would have fallen. If it had fallen within the rails, or very close to the rails, or the end of the ties, it would have been liable to have been moved by section men. These embankments are constantly being filled up by gravel trains, and I should have supposed that it would have been very impracticable to place the corner there. I do not see any difficulty in the actual placing of it there. The fact that it may have been covered up or may have been removed is the reason why I thought it ought to have been placed where it was placed" (folios 276 to 279).

These witnesses were introduced by the plaintiff. We have quoted substantially all the evidence on this point. The defendants introduced no evidence on this question. The Court gave two instructions bearing upon this corner post, numbered eighteen and nineteen, which we will now consider.

Instruction eighteen was as follows:

"Upon this point the Court instructs you that unless you find from the evidence that the southwest corner of the Tecumseh claim fell upon precipitous ground and within the lines of the rails of the Florence and Cripple Creek Railroad, or so near to one or the other of them that the erection thereof would be interfered with by the passage of trains, and was, *for that reason*, impracticable, then you are instructed that it was the duty of the plaintiff to set his post at such corner. If, on the other hand, you should believe from the evidence that the proper place of such stake was within the lines of the rails of said road, then you are instructed that under the statute such witness corner shall be set at the nearest practicable point. Whether this was done, you are to determine from the evidence in the case, and unless you should believe in that event that the said witness corner was set substantially at the nearest practicable point, the marking of said claim would be invalid."

The jury examined this corner, and, doubtless, ascertained exactly where the same, by right, should have been placed. At all events they had the advantage of the testimony and their own observation. Under the testimony and their own observation they may well have come to the conclusion that the post would not have interfered with the *passing of trains*. They could also have found that it would not have fallen on the *roadbed*. But they could not have concluded, without rejecting all the evidence (and it will not be presumed they did this) that it did not fall either on the roadbed or on one of the slopes of the embankment. The place improperly pointed out by Smith was at the end of a trestle, under and the side of the roadbed, so that the stake would not, if projected, have come up between the rails (record, folios 672, 673).

It seems to us that it is clear and certain that the question as to whether a railroad embankment is precipitous ground, where the proper placing of a corner post is *impracticable*, is a question of fact for the jury, under proper instructions to determine. In their testimony, the witnesses carefully distinguished between the roadbed and the slope of the embankment. The roadbed is the level surface where the ties are laid. These slopes to this embankment fall within every definition of precipitous ground. It may be that the roadbed itself is not precipitous ground, but, as to the sides of the embankment there can be no doubt. Both the roadbed and the entire embankment are *private premises*. They are in the possession and constant use of another. They are constantly undergoing repairs and changes. The embankment is constantly shaking, settling and caving down. This was shown by the testimony, and it is, also, a matter of general knowledge.

Our statute should receive a reasonable construction. Of course, a letter cut in a stone can not take the place of a post. This was all that was adjudicated in Taylor v. Parenteau (23 Colo., 368). The statute is not, however, susceptible of literal enforcement in all cases. Suppose a house is standing where a corner, by right, will fall; must the house be removed or the corner placed upon it? Can not, in such a case, a witness corner be placed at the nearest practicable point? We think so. But in this case, in asking that a witness corner be allowed, because the true corner would fall on an unstable railroad embankment, we are clearly with-

in the letter, and certainly within the spirit of the statute.

In passing upon the propriety of the instruction under consideration, the Court says:

"The instruction referred to is not *happily worded*."

The wording is happy enough if it correctly states the law. There is no ambiguity about it. Our position is, not that it is ambiguous, uncertain or *unhappily worded*, but that it is *not a correct statement of the law*. Of course, this instruction must, as the Court says, "be read as a whole." But when we do this, we find that it relates to but one subject; contains but one legal proposition, and assumes but one state of fact. It plainly declares that we could not erect a witness corner, unless the true corner not only fell upon precipitous ground, where the erection of the post would be impracticable, but that it must have fallen between the rails, or so near to one or the other of them, that the erection thereof (meaning, perhaps, the act of erecting) would be interfered with by the passage of trains, and was, *for that reason alone*, impracticable. No one can read this instruction, in connection with the statute, without seeing that a requirement is made as a condition to the right to erect a witness corner, that is *entirely foreign to the statute*. The statute declares that if a true corner falls upon precipitous ground, where the placing of it is impracticable, it may be placed elsewhere; but the instruction declares that, before the corner can be placed elsewhere, the true corner must, also, fall within the rails, or so near them

that the erection of the post would be interfered with by the passage of trains. If the post, by right, fell upon the roadbed, and between the rails, then it may not have been upon precipitous ground; and may not come within the letter of the statute. The slopes of this embankment, however, do come, technically, within the definition of precipitous ground.

The statute provides that:

"Where, in marking the surface boundaries of a claim, any one or more of such posts shall fall, by right, upon precipitous ground, *where the proper placing of it is impracticable*, or dangerous to life or limb,"

it may be placed at the nearest practicable point. This statute *calls for construction*. It is not clear and definite as to all cases. A case that falls within its spirit will be held to be within it. We shall not quote *familiar rules of construction*. Evidently the General Assembly had in view two considerations: (1) The practicability of actually placing the corner, and, (2) The practicability of maintaining it for the purpose for which it is erected. As to the *actual placing* of the corner, the requirement undoubtedly is, to place it at the true point unless the act of doing so is attended with danger to life or limb. The term "impracticable" relates to the availability of the place for the purpose in view, rather than to the mere act of placing the post. The requirement as to the physical act of placing the post is exhausted by the consideration as to whether it is dangerous to life or limb. Otherwise the clause "or dangerous to life or limb" would be

surplussage. The purpose of erecting a corner post is to give notice. To effect this purpose the post should be permanent. The testimony shows that this railroad embankment had been recently constructed. It had been constructed by piling loose dirt to a height of 12 or 15 feet. Now, can this Court say that, as a question of law, the erecting of a corner, on one of the slopes of this embankment (speaking of the entire structure as an embankment) was entirely practicable? The latest edition of the Century Dictionary and Cyclopedia defines the term practicable as—

"Suitable for practice, fulfillment, or execution; hence, *desirable; advantageous.*"

Two witnesses testified positively (and there was no testimony to the contrary) that the slopes of this structure were not suitable or practicable places to erect a corner, not because the *act of placing* was dangerous to life or limb, but because the post would not have stood and sub-served the purpose for which it was erected. The Court absolutely took away from the jury the right to determine whether or not these slopes constituted precipitous ground, and whether the placing of a corner upon them was practicable. This was error.

But the Court says that we are not in a position to complain of this instruction, because

"It does not appear that the erection of the stake at the true corner would have been interfered with by the passage of trains."

In other words, the Court says we can not complain of this instruction for the reason that the same was not based upon the evidence in the case.

If this construction of the evidence is correct, then that would be an additional reason why the instruction was erroneous. We have known of courts declaring instructions erroneous because they were not based upon evidence, but who ever heard before of a Court sustaining an instruction upon the distinct ground that there was no evidence to base it upon? But the statement of the Court is not, in point of fact, precisely correct. We have quoted the evidence. It is clear that the corner post would have fallen either upon the *level roadbed* or on *one of the slopes* leading up to it, but as to which of these locations it would have fallen on, *was left uncertain.* It was to solve this question, among others, that the jury was sent to view the property. It was the duty or the Court to instruct the jury upon both theories. The instruction under consideration was narrower than the case as made by the evidence, and took away from the jury the entire theory of the plaintiff, as shown by the evidence, to the effect that a corner placed upon the freshly constructed slopes of this structure would not stand, and hence the placing of it there was *impracticable.* But the Court says that this instruction should be read in connection with the one immediately following. This we will do.

Instruction nineteen reads as follows:

"In this connection the Court instructs you that if you believe from the evidence that the southwest corner of the Tecumseh lode fell, by right, *on the roadbed* of the Florence & Cripple Creek Railroad, and that such point was precipitous ground, where the proper placing of such corner was impracticable, and that plaintiff placed such corner stone at the nearest practicable

point, suitably marked to designate the proper place, then such corner was sufficient and valid."

In speaking of the same the Court says:

"From which it is apparent that the Court directed the jury that appellant was required to place the southwest corner post of the Tecumseh lode at the true point, unless the evidence established that such point fell where it was *impracticable to maintain it*."

The instruction says nothing about the question of practicability or impracticability of *maintaining the corner* at any particular point.

This nineteenth instruction was correct as an abstract proposition of law, but it did not in any manner cure the error contained in the one that preceded it, neither was it broad enough to cover the case as made by the evidence. It was limited to the *roadbed*. Both of the witnesses drew a clear distinction between the roadbed and the slopes of this earthwork. They called one the *roadbed*, and the other the *embankments*. Strictly speaking, the whole structure constituted an embankment, but the slopes of the work are clearly distinguishable from the level surface constituting the roadbed. The eighteenth instruction expressly negatived the idea that this post could be placed elsewhere than at the true point, if such true point fell upon one of the sides or end of this earthwork, and would not interfere with the passage of trains, while the nineteenth instruction merely allowed it to be placed elsewhere if it fell, by right, on the roadbed. Under neither of them could the jury treat this witness corner as valid, even though they may have found that the true corner would have

fallen upon one of the sides or the end of this earthwork, and that such point was precipitous ground, and was an impracticable point to place a corner post. Under neither of these instructions could the jury accept the theory of our testimony, to the effect that these *steep slopes* to this *new work* were precipitous ground, and an impracticable point for a corner, for the reason, as given by two witnesses, that the settling and shaking down of the earth, and the material rolling down the slopes of this work, or the additional earth that might be placed upon them by way of repairing and strengthening this structure, would result in a post, extending only twenty inches above the surface, being covered up or carried down the bank. Can the Court, *as a legal proposition*, repudiate this theory? If not, then we are clearly entitled to have it passed upon by a jury under instructions which will, at least, *allow them* to adopt it.

Unless we treat this entire superstructure, including the slopes of the work, as the roadbed, there is no conflict between the eighteenth and nineteenth instructions. They are alike, with the exception that the eighteenth requires more than the nineteenth. The nineteenth is embraced in the eighteenth. The nineteenth can not be construed as limiting or restraining anything asserted in the eighteenth. But if there is a conflict between these instructions, which one of them did the jury follow? Can the Court answer this question even to its *own satisfaction?* Upon what was the verdict based? No one knows. For all that appears it may have rested solely on the supposed invalidity of this

southeast corner post. The Courts of Colorado have held that the giving of conflicting instructions (one being correct and the other erroneous) necessitates a new trial (Davis v. Graham, 2 Colo. App., 210; Grant v. Varney, 21 Colo., 329). It cannot be said that it appears that the error in giving the eighteenth instruction did not prejudice the appellant; and, in such case, it has recently been held that the judgment must be reversed (The Smuggler Union Min. Co. v. Broderick, 25 Colo., 16). We believe that we have the right to respectfully invoke the benefit of these former adjudications of the Colorado courts, which are in harmony with the decisions of this Court.

As the question of the markings on this southwest corner stake was merely mentioned, but not decided, we shall not discuss it at length. We do not understand that anyone has ever undertaken to so mark a witness corner as to give the course and distance to the true corner. The certificate of location called for a witness corner at corner No. 4, and gave the course and distance from that to the point where the corner would, by right, have fallen. This may not be a literal compliance with the statute, but it is sanctioned by usage. But no question of this kind was passed upon by the court below. Our certificate was admitted in evidence. No exception, or counter assignment of error was saved or presented upon this point, and it is, therefore, not before the Court.

VII.

Place of Discovery.

The act of Congress provides:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim." (R. S., section 2320.)

We claim that, under and by virtue of this statute, we were entitled, after showing a well-defined crevice in the Tecumseh discovery shaft, to show and rely upon two other *admitted discoveries* in shafts other than the discovery shaft, but within the limits of our claim. The act of Congress authorizes a location to be made upon a discovery within the limits of the claim. This is the clear implication.

There are decisions that plainly hold that there need be no discovery in the discovery shaft, and that a discovery anywhere within the limits of the claim is sufficient. (North Noonday Min. Co. v. Orient Min. Co., 1 Fed., 522; 6 Saw., 299; Chambers v. Harrington, 3 Utah, 94; Wight v. Tabor, 2 Land Dec., 738; same case *Id.*, 743; O'Donnell v. Glenn, 8 Mont., 248.)

In Wight v. Tabor (2 Land Dec., 725), Mr. Teller, as Secretary of the Interior, said:

"On examination of all the testimony, I am satisfied that there was *no mineral in place in the discovery shaft;* but I am satisfied that before other parties had acquired rights in conflict with the rights of applicants that they had discovered mineral within the boundaries of the original location" (2 Land Dec., 743).

The evidence in the Wight v. Tabor case showed that while there was a second location of the Maid of Erin made after the alleged discovery

in the working shaft, it was made upon the old discovery shaft. We will not quote further from this decision, but we ask the Court to give it a careful consideration. We have, however, made no contention to the full extent of this decision.

The State statute provides as follows:

"Before filing such location certificate, the discoverer shall locate his claim by, first, sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice."

To require this crevice, as disclosed in the discovery shaft, to contain a vein, and then to exclude and disregard all discoveries of veins elsewhere, within the limits of the claim, is to give this State statute a construction which brings it into conflict with the act of Congress. This is what the Court below did, and thereupon a Federal question is clearly presented.

In approaching the discussion of any legal question, raised in an appellate court, it is proper to have in view the manner in which the question was raised in, and disposed of by, the Court below. We should also have constantly in view the facts to which the law is to be applied, especially where these facts are either *undisputed or expressly admitted.* In February, 1894, J. W. Carr entered into a contract with Dr. Beals by which, in consideration for an interest, he obligated himself to discover mineral on the Tecumseh. At that time there was a shaft between 40 and 50 feet deep. He commenced work about April 1, 1894. He sunk a new shaft 38 feet deep and drifted 10 feet from the bottom.

This is the present discovery shaft, and is marked on the map as "shaft No. 1." He thought and claimed that he had made a *valid discovery* according to his contract. He then moved further up the hill and sunk shaft No. 2 to a depth of 45 feet, and a drift of 12 feet. Still later he sunk shaft No. 3 to a depth of 46 feet and a drift of 36 feet. Shaft No. 1 was completed by the middle of June, 1894; shaft No. 2 was completed by September 1, 1894, and shaft No. 3 was completed in 1894. Mr. Carr had testified that he found a *well-defined mineral-bearing vein* in shafts Nos. 2 and 3, and was proceeding to state fully that he did not relocate on either of these shafts, because he believed he had a valid discovery in shaft No. 1, when Mr. Thomas interposed and said: "I will say now that we will not offer any testimony to the effect that there is not any vein in shafts Nos. 2 and 3." In view of the direct and positive testimony of Mr. Carr to the effect that there were mineral-bearing veins in these shafts Nos. 2 and 3, this statement of Mr. Thomas amounted to an *admission of the fact*, and a claim that the fact was *wholly immaterial*. Other witnesses testified that there were mineral veins in shafts Nos. 2 and 3, and there was no testimony and no contention to the contrary. This evidence in regard to discoveries in shafts 2 and 3 was introduced for the purpose of predicating some claim upon it.

There was clear, certain and positive evidence that our discovery shaft contained a series of *parallel fissures*, which are *characteristic* of the Cripple Creek district. The witnesses for defendants ad-

mitted that these fissures would be veins if mineral, in appreciable quantities, could be found therein. We established, by several witnesses, that ore taken from these fissures assayed from $1.00 to $4.40 in gold. There was some testimony introduced by defendants *purely negative* in its character, to the effect that samples taken from this shaft by Dahl did not assay higher than a trace. In this condition of the testimony we asked certain instructions which were refused, and the Court, either upon the request of defendants, or upon its own motion, gave others bearing upon this question. For the convenience of the Court we will set forth these instructions in full.

Instruction 1, asked by plaintiff and refused by the Court, was as follows:

"No location of a mining claim is valid unless the locator has sunk a discovery shaft deep enough to show a well-defined crevice, and, in addition, thereto has discovered the vein or lode within the limits of the claim; and if the jury believe from the evidence that the Ophir claim was located in 1892; that during that year the discovery shaft was sunk to a depth of from 25 to 28 feet; that no well-defined crevice was shown therein, or that no vein or lode was discovered therein; that plaintiff perfected a valid location in 1894 by sinking a discovery shaft on the Tecumseh lode to the depth of at least 10 feet from the lowest part of the rim of such shaft at the surface and found a well-defined crevice therein, and discovered a vein or lode of mineral within the limits of the said Tecumseh claim; that he posted at the point of discovery, on the surface, a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery, and marked the surface boundaries with six substantial posts, either of wood or stone, sunk in the ground, to-wit: one at each corner and one at the center of each side line, marked on the side or sides which were in toward the claim; that plaintiff executed and filed the location

certificate introduced in evidence; that plaintiff or anyone claiming under him has done $100 of labor or improvements on said Tecumseh claim each year since 1894, they will find that plaintiff is entitled to the possession of the ground in conflict by virtue of a compliance with the statutes of the United States and the State of Colorado."

Instruction 10, asked by the plaintiff and refused by the Court, was as follows:

"If the jury believe from the evidence that plaintiff has disclosed in his discovery shaft a well defined crevice containing mineral in appreciable quantities which can be weighed and assayed, and running from $1 to $3 or $4 per ton, and that such mineral is found in occasional spots in such crevices, and that this discovery was made prior to any similar discovery on the Ophir claim, and the plaintiff has complied with the laws of the State and the United States as defined in these instructions, then your verdict will be for the plaintiff."

Instruction 21, given by the Court, was as follows:

"You are further instructed that while the statutes do not require that the discoverer of mineral or of a vein should sink his discovery shaft at the point of discovery, but may sink the same at any point within the exterior boundaries of the claim he may desire, nevertheless you are instructed that it must be *sunk upon a vein* within said boundaries, and that *the right and extent of the lode mining location must be measured by and from such discovery shaft and its position within the lines of said location.*"

These were the only instructions asked or given having any direct bearing upon the question as to whether we could, under the record facts of this cause, take any benefit from the admitted discoveries of veins in shafts 2 and 3. We claimed we could; and, for that purpose introduced the evidence. Mr. Thomas threw down the gauntlet on this question, early in the trial, by admitting the

discoveries, evidently with the view of contending that such discoveries went for nothing.

We note that in the record it appears that the trial Court marked Instruction 1 as having been *given in substance* (record, folio 613). But this is a *mistake*. This instruction plainly announces that if plaintiff found a *well-defined crevice* in his discovery shaft, and *elsewhere* discovered a vein or lode of mineral *within the limits* of the said Tecumseh claim, then he had made a valid discovery; and no instruction given gave any countenance to this theory.

The Supreme Court made some kind of a disposition of this question in its original opinion, but as to what was said or adjudicated therein we are not permitted to say, for, in its opinion, on rehearing, it struck out and suppressed all that it had said on the subject, and substituted what follows:

"Counsel for appellant contend that under instructions given and refused, the jury was precluded from considering the admitted fact, that veins were exposed in two different shafts upon the Tecumseh, designated 2 and 3. What we said in the original main opinion on this subject is withdrawn. In considering this question, these facts must be borne in mind: Whether or not a mineral-bearing vein was disclosed in the discovery shaft upon which the present location of the Tecumseh is based, was controverted. No location was made upon either of the discoveries in shafts 2 and 3. The proposition of counsel for appellant is, that if a well-defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim, which disclose the mineral necessary to constitute technical veins.

No question is raised regarding the validity of our statute relative to the location of mining claims. In order that there

may be no mistake as to the position of counsel on this subject, we quote from their original brief as follows:

'If the discovery shaft contains a well-defined crevice, thus giving all the appearance of a discovery, the claimant may rely upon other shafts within the boundaries of the claim for his discovery of the mineral necessary to constitute technical veins. The State statute does not provide what the well-defined crevice shall contain, while the act of Congress makes no provision as to what shaft the vein required shall be in. Reading and applying the two statutes together, we submit that the well defined crevice must be in the discovery shaft, and the mineral-bearing vein may be found in some other shaft upon the claim.'

And also from their reply brief, in support of their petition for rehearing, the following:

'We come now to the question as to whether the entire right to a claim, in so far as the same depends upon a discovery of a well-defined crevice (as required by the State statute) and the discovery of a vein (as required by the act of Congress) is *wholly dependent* upon the discovery shaft.

We have not questioned the validity of our State statute. It is not necessarily, when properly construed, in conflict with the act of Congress. Both the State statute and the act of Congress can be given effect, and they should be so construed as to accomplish this.

We have not maintained that a discovery shaft can be altogether dispensed with. Neither have we maintained that when the State statute in regard to such crevice has not been literally complied with, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which, within the limits of the claim, is required by the act of Congress.'

The statute of this State, which designates what shall be disclosed in the discovery shaft, provides that it shall disclose a well-defined crevice at the depth of at least ten feet from the lowest part of the rim of such shaft, at the surface. (Sec. 3152, Mills' Ann. Stats.) It being conceded that the laws of this State relative to the requirements of a discovery shaft are valid, it appears to us that the proposition upon which counsel rely is not tenable. If, as stated, the State statute is legal, it necessarily follows that

the discovery shaft must expose the vein upon which the location is based, or at least disclose one, and therefore the mere discovery of some other vein within the limits of the claim cannot supply the absence of the one required to be exposed in the discovery shaft. In other words, the proposition of counsel for appellant can not be upheld, unless the State statute is declared invalid, and the admission upon their part that it is not, relieves us from the necessity of determining the effect of discoveries in shafts 2 and 3 of the Tecumseh.

'Crevice,' as employed in the statute relative to a discovery shaft, clearly means a mineral-bearing vein. It was so held by this Court in Bryan v. McCaig, 10 Colo., 309. The Circuit Court of the United States for the District of Colorado has adopted the same view. Van Zandt v. Argentine Co., 8 Fed. Rep., 725; Terrible Co. v. Argentine Co., 89 Fed. Rep., 583; Cheeseman v. Shreeve, 40 Fed. Rep., 787.

Under these decisions, coupled with the admitted legality of the State statute, the fact that discoveries were made in shafts 2 and 3 upon which no locations were made, does not in any manner affect the validity of the Tecumseh."

A labored effort is made to place the decision of the Court below upon some concession by us as to the validity of the State statute. But the Court *misstates* our position throughout. This sufficiently appears by the quotations made by the Court from our brief. We were contending for a *construction* of the State statute in harmony with instructions one and ten, which we had asked and the trial Court had refused. We admitted that if our construction of the State statute was adopted, then there would be no conflict between that and the act of Congress. The Court, by a singular distortion, treats this as a general concession that the State statute is valid; and, in doing so, gives the State statute a construction which we, at all times,

contended would bring it into conflict with the act of Congress. In other words, we contended that the State statute, with a certain construction, would be valid, but maintained that, with a certain other construction, it would be invalid, as being inconsistent with an act of Congress, and the Court, while giving it the latter construction, held us to an unconditional concession as to the validity of the State statute.

But the Court again *misrepresents* our *entire theory* as to the office and requirements of a discovery shaft. We filed four briefs in the Colorado Supreme Court in which this question was discussed. We may not, perhaps, be permitted to allude to them further than the Court has done so. But this Court can see from the record precisely what theory we tried the case on, and it is not the province of the lower Court, by making garbled extracts from our briefs, to change the issues of law upon which the cause was made to turn.

Our theory as to what the discovery shaft must show was distinctly set forth in instruction numbered ten which the Court refused. This instruction was based upon the evidence; it distinctly called for a *well-defined crevice;* it required that it should contain mineral *in appreciable quantities*, by which is meant quantities which can be *weighed and assayed*, and running from one to three or four dollars per ton, and that this kind of mineral must be found in occasional spots in such crevice. What warrant does this instruction give the Court below for saying:

"The proposition of counsel for appellant is, that if a well-defined crevice, although *not bearing mineral in appreciable quantities*, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim, which disclose the mineral necessary to constitute technical veins?"

Thus an alleged contention on one hand and concession on the other, neither of which was ever made, is the foundation for an adjudication that, in an adverse suit, a party can take no benefit of discoveries or developments on his claim outside of his discovery shaft. We have always contended, and we still contend, that this construction of our State statute brings it into direct conflict with the act of Congress.

Instruction No. 21 which the trial Court gave, and which the Supreme Court sustains, is not ambiguous or doubtful as to its true meaning.

It announces two distinct propositions: (1) That the *right* of a mining location must be measured *by* the discovery shaft. (2) That the *extent* of the lode mining claim must be measured *from* such discovery shaft and its position within the lines of said location. Whoever drew this instruction had both of these propositions in view and condensed them into one paragraph. This instruction has *two kinds* of measurement in view. The word "measured" as applied to one of the subjects to which it relates is not the best word that could be used. The word is evidently used in a very broad sense. A *right* is to be measured and an *extent* is to be measured. A *right* cannot be measured by a tape line while an *extent* can be so measured. A

right cannot be measured *from* a certain place while an extent can. Hence the word "*by*" is introduced. An extent cannot be measured *by* a discovery shaft, but a *right* can. Clearly the word *by* applies to the *right* to the claim, and the word *from* relates to the *extent thereof*.

Both of the propositions contained in this instruction are erroneous. A claim need not be *measured from* a discovery shaft. The discovery shaft may be near one end or near one side of the claim. Indeed the discovery shaft has nothing to do with determining the *extent or boundaries* of a claim. All that is required is that the claim *includes* the discovery shaft (McGinnis v. Egbert, 8 Colo., 54). A location certificate must state the number of lineal feet claimed each way from the discovery shaft (Armstrong v. Lower, 6 Colo., 396), but the certificate need not state the distance from the shaft to the side lines (Quimby v. Boid, 8 Colo., 203). The width of the claim, except in certain counties, is 150 feet on each side of the center of the vein or crevice. This means the center of the vein or crevice *at the surface* and not at the point of discovery, which might be on the dip of the vein, and so far from the apex as possibly to be entirely without the claim. In such a case we are inclined to think that a discovery shaft might be outside of the *surface boundaries* of the claim. Certain it is, however, that the side lines of the claim do not have to be measured from the discovery shaft, or located, as this instruction declares, according to the position of the discovery shaft within the lines of the location.

We come now to the question as to whether the entire right to a claim, in so far as the same depends upon a discovery of a well-defined crevice (as required by the State statute) and the discovery of a vein (as required by the Act of Congress) is *wholly dependent* upon the discovery shaft.

There is a difference between the State statute and the act of Congress. The language employed is different. The purpose to accomplish is different. If this were not the case the State statute would be superfluous. If they relate to precisely the same thing and are different, the State statute would be invalid. Unless they can be reconciled this State statute must fall. The State statute requires the discovery shaft to show a well-defined crevice, and it has been said that such crevice must contain *mineral-bearing rock in place.* (Brian v. McCaig, 10 Colo., 309.) The act of Congress requires "the discovery of the *vein or lode* within the *limits* of the claim located." A well-defined crevice filled with mineral-bearing rock in place would be a vein or lode. The ruling in Brian v. McCaig (10 Colo., 309) was correct as applied to the facts of that case, for in that case the discovery shaft was relied upon to show both the well-defined crevice and the vein or lode. No question arose as to a case where a well-defined crevice was shown in the discovery shaft, and the vein or lode, consisting of a well-defined crevice, which was filled with mineral-bearing rock in place, was shown in another shaft within the limits of the claim. In addition to this case, counsel upon the other side, to sustain their contention, have cited from the adjudications

of the same Court the following mentioned cases: Wolfley v. Lebanon Company, 4 Colo., 112; Gray v. Truby, 6 Colo., 278; Electro-Magnetic Co. v. Van Aukin, 9 Colo., 204; Pelican & Dives Min. Co. v Snodgrass, 9 Colo., 339; Omar v. Soper, 11 Colo., 380; Girard v. Carson, 22 Colo., 345. We find no mention of this question in any of these cases. The question is alluded to in Fleming v. Daley (12 Colo. App., 439), but that is a case, like Bryan v. McCaig (10 Colo., 309), in which no discovery outside of the discovery shaft was relied on. The result is that we think we can safely say that no Colorado Court has ever before adjudicated that, in an adverse suit, where both parties are required to show compliance with both the State statute and the act of Congress, a party cannot, *for any purpose*, rely on discoveries of veins outside of his discovery shaft and within the limits of his claim. Counsel will cite decisions of other courts, to-wit: Van Zant v. Argentine Min. Co., 8 Fed., 725; same case, 122 U. S., 478; Gwillim v. Donnellan, 115 U. S., 45; Upton v. Larkin, 6 Pac., 66; same case, 17 Pac., 728; same case, 144 U. S., 19; Cheeseman v. Shreeve, 40 Fed., 787; Book v. Justice Min. Co., 58 Fed., 106. None of these decisions have any bearing upon the question under discussion, with the single exception of Van Zant v. Argentine Min. Co. (8 Fed., 725), and that was affirmed without any allusion to any such question, showing that the same was not necessarily involved in the case; besides, this decision goes no further than to hold that a discovery outside of the discovery shaft will not be sufficient where there is

no discovery in the discovery shaft. It is true that Judge Hallett says that

"A location rests on what may be found in the discovery shaft, and if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail."

But this does not meet the question under consideration. It decides nothing more than that our State statute must be complied with.

On the other hand there are decisions that plainly hold that there need be no discovery in the discovery shaft, and that a discovery anywhere within the limits of the claim is sufficient (North Noonday Min. Co. v. Orient Min. Co., 1 Fed., 522; 6 Saw., 299; Chambers v. Harrington, 3 Utah, 94; Wight v. Tabor, 2 Land Dec., 738; same case, *Id.*, 743; O'Donnell v. Glenn, 8 Mont., 248).

Mr. Lindley (1 Lind. Mines, Sec. 345), notes the fact that the Montana and California decisions are based upon a statute different from the Colorado statute; but counsel on the other side will devote much attention to an attempt to prove that our statute is but a re-enactment of the regulations of miners in force in all the mining states prior to the adoption of the statute, and we think they will succeed in doing so.

Mr. Morrison, in speaking of the discovery shaft, says:

"It need not contain ore or mineral, but it must show mineral-bearing rock—that is the gangue or crevice material of the vein; and it is error to omit this, as one of the essential elements of a discovery shaft in an instruction purporting to define such elements" (Mor. Min. Rights, p. 33).

Messrs. Barringer and Adams (Mines and Mining, p. 214), give decisions both ways on this question, but express no opinion of their own.

We find, then, upon a review of all the authority there is upon the question that two conflicting theories have been adopted: (1) That there must be a discovery of some kind in the discovery shaft, and that when no discovery of any kind has been made in such shaft a discovery elsewhere will not avail. (2) That there need be no discovery of any kind in the discovery shaft, or any particular shaft, or at any particular point; but that a discovery, at any place within the limits of the claim is sufficient. Long before any statute was adopted on that subject the regulations of miners, in all the mining states and territories, required a discovery to be evidenced by some working in or upon the ground. The purpose of this was to give notice to the other prospectors. It is sufficient now to say that as to lodes and veins, all of these regulations required some work to be done which disclosed a crevice—an actual crevice—while some of them went further and required mineral to be disclosed in such crevice. These regulations refer generally to *lode claims*. Where loose quartz and pay dirt was found "*without any regular crevices*" the ground was called "patch diggings" and claims located thereon were called "patch claims."

An examination of all these miners' regulations will show that much more prominence was given to the *actual, visible crevice than to the contents of the crevice*. An actual crevice could be seen by

all prospectors, and they would thereby be put upon inquiry as to what such crevice *might contain*. When a well defined crevice was disclosed, notice was brought home to any one going upon the same ground to locate a claim. The prospectors were not all assayers. Indeed, hundreds of lodes have been located on well-defined crevices when and where it would have been impossible to demonstrate, by an assay, whether the crevice contained an appreciable quantity of mineral or not. Let us suppose a case: Suppose a miner, under these mining regulations, had sunk three shafts in a row fifty feet apart, disclosing the same well defined crevice, and had posted the notice at the center shaft, and called this his working discovery or discovery shaft. The crevice looks the same in all three shafts; but, upon assaying the crevice matter, it was found that the same in the center shaft was almost barren of mineral, while in the other two shafts it was rich in gold. What would be the result? Would the discoverer loose his claim? What would have been the verdict of the miners in such a case when they came to construe their regulations? There can be but one answer to this question.

Now, these same miners, or their representatives, came together and passed a statute requiring the discoverer of a lode claim (and the statute applies only to lode claims) before filing his location certificate to sink a discovery shaft deep enough "to *show* a well-defined crevice," and to post a plain sign or notice giving certain information. The statute says nothing about the *contents* of this crev-

ice; but the shaft must *show* the crevice. If the crevice is well defined, does it make any difference whether it is struck at a point where the vein matter is barren or mineral bearing? Waiving this inquiry, let us inquire what must the contents of this well-defined crevice be in order to make a valid location thereon? This inquiry brings us face to face with the rulings of the trial Court upon which we have assigned error. These rulings consisted in refusing instructions 1 and 10 asked by us, and in giving instruction 21. It may be that instruction 1, standing alone, would not be correct in that it does not *assume* what the *contents* of the crevice were; but instruction 10, asked with it, was clear upon this point. Of course the entire law of a case can seldom be covered with one instruction. If two instructions, asked together, when considered together, as the trial Court directed the jury to consider all the instructions in this cause, clearly cover a *distinct phase* of a cause, they cannot be declared erroneous merely because the law upon the point is covered by two instructions when it may, possibly, have been covered by one. Now we respectfully yet earnestly *petition the Court* to state these two instructions *literally* and declare whether or not they (when taken and considered together) *fairly describe a valid discovery shaft;* and, if not, to state wherein they are defective. These instructions are strictly within the evidence. Every fact assumed therein was clearly proven.

The trial Court used five instructions (3, 4, 5, 6 and 16) with which to define a vein or lode, and

assumed that it must be in the discovery shaft. They were all pure abstract propositions of law. They did not recite the evidence, or assume any hypothetical case. They will be read in vain to find any *distinct equivalent* of either instruction 1 or 10 which the Court had refused. This Court has always held that instructions should be based upon the evidence; should assume the facts as they are contended for by the parties, and should not be mere abstract propositions of law; but now the Court is asked to sustain the refusal of instructions drawn as heretofore sanctioned, to the end that nothing but abstract propositions shall be given. We can see no very special reason why the law should be revolutionized to enable this particular judgment to stand.

If this Court shall declare that these instructions 1 and 10 fill the requirements of the statute in relation to a discovery shaft, but that they do not assume the existence of a technical lode or vein in this shaft, within the meaning of the act of Congress, then the question recurs as to whether or not we may go outside of the discovery shaft for the discovery of such lode or vein. There is clear foundation in the evidence for a distinction between a well defined crevice, even one that contains mineral as described in our instruction 10, and a technical lode or vein. To illustrate, Mr. Moore, a leading expert witness of defendants, testified, on cross examination, that—

"If material can be taken out of any of these crevices in the Tecumseh discovery shaft that will assay in appreciable quantities, I should say that that was good evidence that such a crevice

was a vein: it would depend upon the extent to which the mineralization extended, and upon this hypothetical case, if I was asked my opinion whether it was a vein or not, I should say it was."

On re-examination this witness testified:

"If I were shown a shaft 38 feet in depth and within a distance of from 16 to 24 feet below the collar of the shaft, you should take 16 assays of which 6 would show appreciable quantities, there being nothing in the balance of the shaft, I would not call that a vein."

Again Mr. Delavergne, an expert witness for defendants, said:

"These crevices in the Tecumseh shaft are *pretty well-defined*: they run *very regularly* up and down the shaft." * * "These crevices are parallel and continue up and down the depth of the shaft." * * * "If a $4.40 assay was taken at a point 16 feet and another of $1.20 at 23 feet down, and the balance of the shaft shows nothing but a trace with no quartz visible, I would not call it a vein."

From these quotations from the evidence (and which fairly represents the course of the trial) this Court can see that the cause was tried by defendants upon the distinct theory that we must not only show that our discovery shaft contained a *well-defined crevice containing mineral-bearing rock*, but that such crevice had all the requirements of a technical vein. The defendants tried their case upon the theory that there is a substantial difference between a well-defined crevice, even though the crevice matter will assay in places, and a vein or lode. They and their witnesses claimed that the values must be continuous in order to be a vein. This Court can, therefore, readily see how *desperately we stood in need* of instruction 10, and

how *greviously we were injured* by its refusal if it contains a correct statement of the law. There was no serious contention but that our discovery shaft contained a well-defined crevice. There was clear and positive evidence that assays as high as $4.40 were obtained from it. The contention upon which the cause, both as to the law and facts, in so far as our discovery shaft was concerned, was made to turn, was that we must not only show in the discovery shaft a well-defined crevice, bearing mineral, but that we must prove that such shaft contained a *true vein*, notwithstanding we had shown such true vein in two other shafts within the limits of the claim. This contention, on the part of defendants received the fullest possible sanction of the Court in instruction No. 21. In other words the Court below held that *everything required* by both the State statute and the act of Congress must be in the discovery shaft. This was a flagrant violation of the plain language of the act of Congress.

We do not know how the jury found in regard to our discovery in the discovery shaft. Of course, if they found that there was a valid discovery (which if made at all was made in June, 1894), they must have found, either that defendants had a discovery in 1892 in their 25-foot shaft, or that our claim was illegal on account of a defect in the southwest corner post. Counsel on the other side will talk about how the jury found the issues as familiarly as though they had been on the jury; but they cannot lawfully know how the jury found any issue further than a general verdict reveals.

Upon the evidence the jury may have found that we had the first discovery and still have defeated our claim by reason of the southwest corner post; or they may have found that we had a well-defined crevice in our discovery shaft, *bearing mineral*, but that under the instructions, such crevice did not amount to a lode or vein; or they may have found that there was in 1892 in the Ophir shaft a legal discovery. There are several theories upon which the jury may have rendered this general verdict, even though they found that defendants had made no discovery until 1895. As we have stated they may have found that we never discovered a vein in our discovery shaft (and they could not consider veins elsewhere discovered) or they may have found against us as to the southwest corner post. In either of these cases they could have rendered the verdict they did render even though they found that defendants made no discovery until 1895. Let it be constantly borne in mind that defendants made their discovery either in 1892 or in 1895, for there was no work done upon the Ophir claim between these dates. If, as a matter of fact, the jury found that defendants made their first discovery in 1895, but that our discovery shaft, sunk in 1894, did not contain a vein or lode, the entire result would have been changed by allowing the jury, in accordance with instructions 1 and 10, asked by us and refused by the Court, to take into consideration the veins found in shafts 2 and 3. We do not believe that any *uncorrupted jury* could ever find that there was a well-defined crevice or a lode or a vein disclosed in the

Ophir shaft in 1892. The attempt to show it was a transparent fraud, made for the mere purpose of giving a *packed jury* a flimsy excuse. If we are to consider this verdict as anything more than the product of the corrupt influences which packed and controlled the jury—in other words, if we are to seek, from the evidence, for any rational theory upon which the jury resolved the cause—we should be forced to the conclusion that they found that defendants made no discovery until 1895, but that we had no vein in our discovery shaft; and if this were the case, the withdrawal from the jury of all consideration of shafts 2 and 3, by instruction No. 21, was the very ruling upon which the verdict went against us.

Counsel for defendants made a contention in the Supreme Court, and they will, doubtless, renew it here, which was not made in the trial Court. If their theory is correct then the entire trial of the cause proceeded, in the Court below, upon an erroneous theory. The cause was tried, as shown by the instructions, upon the theory that the ground in dispute belonged to the party who made the first *valid discovery of mineral*. The position will now be taken that, notwithstanding we may have made the first discovery, they are entitled to the ground because they succeeded (by fraud) in obtaining a receiver's receipt which was afterwards canceled. To make this suggestion *plausible* they assert that we had no claim until after the receiver's receipt was issued. To make this assertion *possible* they treat the Tecumseh claim, as located in 1892, as *no claim at all*. They

say it was no claim, because there was no discovery. It is true that a claim without a discovery is invalid, but it may ripen into a valid claim, at any moment, by a discovery, provided no conflicting rights have intervened. A better right can arise only from a prior discovery. A filing of a false affidavit of discovery, and a false affidavit that $500 worth of labor and improvements have been made upon the claim, upon which a receiver's receipt is obtained, does not take the place of a discovery, or create any right. It may be that, in an action at law, such receipt would be evidence of *legal title* until the same is canceled. But when it is canceled, and this is done upon an adjudication which shows that it should never have been issued, its legal effect, *ab initio*, is utterly destroyed. It can no longer be invoked, either as proof of title or as proof that the ground covered by it had ever ceased to be a part of the public domain. Counsel discuss this question in the light, or, rather, in the darkness, of a confusion of the facts. Both parties went upon the public domain to prospect for mineral at about the same time. The defendants sunk the first shaft, about ten feet deep, and put up the first notice, but they did not record their claim within the time fixed by law. This is an undisputed fact to be ascertained from the records themselves.

Statutory provisions of the State of Colorado provide as follows:

"The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

First—The name of the lode.

Second—The name of the locator.

Third—The date of location.

Fourth—The number of feet in length claimed on each side of the center of discovery shaft.

Fifth—The general course of the lode as near as may be."

"Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void." (Mills' Stat., Secs. 3150 and 3151.)

The defendants' location certificate claimed a discovery as of February 3, 1892, and was not filed for record until May 5, 1892, which was more than three months from the date of discovery (record, folio 559). As soon as these three months expired defendants forfeited all their *possessory rights*. Any person had the perfect right to enter upon the premises, and make a location. Any person who was already upon the premises, and had made a location, would at once acquire a *better possessory title* than the defendants had, and would retain the same during the time allowed by law in which to record his claim. The record of the Tecumseh claim was made in due time. It follows that the plaintiff in error has the *older and better possessory right* to the ground in conflict between the Ophir and Tecumseh. This consideration, however, has little bearing upon the actual merits of the case, as the case was made to turn, in many of its phases, upon the sole question as to who made the *first valid discovery;* but it serves to show the great injustice inflicted upon plaintiff in error by excluding his *original* certificate of location.

The plaintiff below sunk a shaft about ten feet deep and filed a certificate of location within *due time*, but a day or two later than the defendant's filing, which, as we have stated, was *out of time*. Neither party at the time of recording, had any discovery. In 1892 the plaintiff sunk his shaft to the depth of 43 feet, and, in the same year, defendants sunk their shaft to a depth of 25 feet. In 1893 defendants undertook to patent the Ophir, and plaintiff, not discovering their advertisement in time to adverse, filed a protest. Both parties were in actual possession of their respective claims. The defendants did no further work until 1895, while plaintiff went on with the development of his claim, and, in 1894, made his discoveries in shafts 1, 2 and 3, and relocated upon No. 1. On June 7, 1894, the commissioner of the general land office held defendant's entry for cancellation. This date is fixed by the decision of the Secretary of the Interior. This ruling was affirmed by the Secretary of the Interior on December 28, 1895, and, again, on rehearing, on March 11, 1896. The larger part of the work done in sinking shafts 1, 2 and 3, was done after the Commissioner's decision of June 7, 1894. These facts appear from the decisions of the Secretary of the Interior, which decisions defendants had excluded from the evidence. Counsel, after getting this evidence excluded, will refer to it and rely on it for their own purposes. It is clear and certain that these decisions were competent evidence for the purpose, if for no other, of showing that both the original location of 1892, and the addi-

tional location of 1894, of the Tecumseh claim, were made upon the unoccupied public domain. After the Court below had excluded our original certificate of location we could not rely upon or refer to it for any purpose. It put us before the jury, practically in the attitude of going upon this ground in 1894, and, for the first time, making a location of ground for which a receiver's receipt had been issued. This was one of the *injurious effects* of the exclusion of our original certificate of location. It gave them the very opportunity they wanted of raising a *hue and cry*, before the jury, to the effect that we were *mere jumpers*. And now they will practically resume the same hue and cry before this Court. We must, however, remember that before shaft No. 1 was completed and before shafts 2 and 3 were sunk, the Commissioner decided (on June 7, 1894,) that defendants had made no discovery. We think this decision went into effect upon the date of its rendition for all purposes except its enforcement. It established the *status* of the ground; it determined that it was, and always had been, a part of the public domain. Any citizen, having the right to go upon the public domain and locate a claim, could safely rely upon this decision for the fact that defendants had made no discovery at the time covered by the adjudication. By ascertaining that no work had been done after that time he could justly assume that defendants had not succeeded in segregating any part of their claim from the public domain. There is nothing in the case of Omar v. Soper (11 Colo., 380), relied on by defendants, inconsistent with

this position. No one can acquire an exclusive right to a foot of the public mineral domain until he has made a discovery. The sinking of a discovery shaft; the posting of notice; the placing of boundary stakes, and the surveying and recording, are all acts of location that *follow* a discovery. If they are made before discovery they establish no right; they are absolutely worthless. and the claim is void unless the discovery is made prior to a discovery by some one else. When this is done it relates back, in the absence of intervening rights, to the date of the earliest act of location. It is clear and certain that if defendants did not have a discovery in their 25-foot shaft in 1892, they had none until they resumed work in 1895, and that, until this latter date, the ground claimed as the Ophir claim remained a part of the public domain. (Erwin v. Perigo, 93 Fed., 608; 35 C. C. A., 482; Ledonx v. Forrester, 94 Fed., 600).

Counsel for defendants in error, in discussing the general question as to whether we can take any benefit from the discovery made in shafts 2 and 3, have heretofore seemed to rely very much on such cases as Girard v. Carson (22 Colo., 345). We do not think that this case has any bearing on the question. We have not maintained that a discovery shaft can be altogether dispensed with Neither have we maintained that when the State statute in regard to such crevice has not been literally complied with, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which, within the limits of the claim, is required by the act of

Congress. While we do not deem it necessary to the proper solution of this question to make any criticism upon the case of Girard v. Carson, we call attention to a recent case in Utah in which it is held that, where the original discovery of a vein on which a mining location is based is included within the surface boundaries of a junior location, which goes to patent without protest from the owners of the prior location, but before such patent a new discovery has been made on the prior location, without the boundaries of the junior location as patented, and within the surface boundaries of the prior location as originally located, and development work is being there prosecuted in good faith by the owners of the prior location, their claim is valid, and holds as to all ground not included in the patent of the junior location notwithstanding the loss of the original discovery (Silver City Gold and Silver Min. Co. v. Lowry, 57 Pac., 11). We cannot see why the sale, or the loss by mere failure to adverse, of a discovery shaft, should result in the loss of an entire mining claim. It seems to us that, as against all but the patentee, the locator who has thus parted with his discovery shaft, but has disclosed his vein elsewhere, would be entitled to prove his discovery of a well-defined crevice in the discovery shaft, and that, at the time the location was made, such shaft was on the public domain—in other words, that the sale or loss by failing to adverse, of the discovery shaft, would only inure to the benefit of the grantee or patentee. We will not, however, discuss this question further for the reason that, as before stated, we do

not think it has any material bearing upon the question under consideration.

The locator has to fulfill two requirements. One of these is made by an act of Congress, the other by a State statute. They are not precisely alike. Both statutes were made with reference to lodes and veins. The miners' regulations, in force prior to the passage of these statutes, carefully distinguished between lode claims and all other claims. All veins then known to exist, and hence, all veins that could be supposed to have been in the legislative mind, were fissure veins. All the evidence in this case, on both sides, shows that the veins in the Cripple Creek district are fissure veins. If the Court will turn to the miners' regulations, it will be found that everywhere they speak of a crevice and not a vein. In only a very few instances do they say anything about the contents of the crevice. Two things are required to constitute a vein. (1) A crevice. (2) Mineral bearing rock, in place, in such crevice. This was perfectly understood by the miners who made all these regulations, which was the law governing locations prior to the passage of these statutes. All lodes or veins were found in crevices, but all crevices did not contain lodes or veins. The State statute, in describing what should be shown in a particular shaft, refers to a crevice, but says nothing about a lode or vein. The central thought in the legislative mind was *notice*. To the end that notice should be given it was required that a discovery shaft should be sunk upon the lode to a depth sufficient to show a well-defined crevice, and

that a plain sign or notice should be posted at the point of discovery, containing the name of the lode, the name of the locator and the date of discovery. The theory of the statute is that the locator *first discovers his lode*, and he then proceeds to locate it, and give notice of it as the statute provides. Of course, the theory of the statute is that the discovery shaft is sunk *upon a lode*, but the men who framed the statute knew perfectly well that lodes or veins may be, at places, absolutely barren of mineral. Hence, in view of this knowledge, in providing that notice should be given by a discovery shaft, they required the crevice to be well-defined, and made no provision as to what the crevice filling should be at that particular point.

This Court is now to render a decision that will be far-reaching. The question raised has never yet been squarely passed upon by this Court. We do not wish our client to lose his property by a decision, on this or any other point, which will not stand the test of time and criticism, and which must be modified, evaded or reversed in the future. Now, let us suppose another case, and one which may appear on the docket of this Court any day. Suppose a citizen discovers a vein and develops it into a paying mine. He sinks a working shaft, and runs drifts for hundreds of feet, and is taking out rich and valuable ore, say that will run $1,000 to the ton; but, as yet, he has made no location. He now proceeds to locate, and, for the purpose of fixing his boundaries, or otherwise, he sinks a discovery shaft, on the lode, a thousand feet away from his mine, which shows a well-defined crevice.

He puts up his notice, marks his boundaries and otherwise complies with all the requirements of the law. It subsequently appears that the crevice as it is disclosed in the discovery shaft, is barren, or nearly so. Or, we will suppose that it appears precisely as the evidence shows the Tecumseh discovery shaft to be, and was assumed by instruction No. 10 which we asked, and the Court refused. How would this Court decide this hypothetical case? This hypothetical case will and must be ruled by the principles announced in the case at bar. Would this Court say that the locator had lost his lode—that he had lost his well-discovered vein, by the manner in which he had proceeded to give notice of his claim? Let it be remembered that the discovery shaft need not be sunk either at the actual point of discovery or at the point where active or extensive development is contemplated. A discovery shaft may be valid that is never sunk deeper than ten feet, and was never intended as a development or working shaft. The sinking of it is or may be a matter purely of form, it is an act kindred in purpose and effect to that of posting a notice, setting stakes, etc. The statute requiring a discovery shaft presupposes that there has already been a discovery and makes this simply one of the formal acts of appropriation. On the other hand the act of Congress deals with the *discovery itself*. It simply requires the discovery of the lode or vein, and this may be made anywhere within the limits of the claim. One statute deals with a matter of form, the other of substance. The construction of these two statutes contended for by

defendants in error *sacrifices substance to form.* Under this construction a man might have a richly paying mine the entire length of his claim, with the exception of the particular point at which he had, for the purposes of location only, sunk his discovery shaft, and still he could have no valid claim. We do not believe that any miners' regulations, (or the State statute), or the act of Congress ever contemplated any such result. These regulations in regard to matters of form should be fairly if not liberally construed in the light of the purpose to be accomplished by them. If a discovery shaft reasonably performs the office for which it was required it is sufficient. The sinking of a shaft ten feet deep was required because that would be something that would be plainly visable. The disclosure of a well-defined crevice was required because that would, on close inspection, be about as plainly visable as the shaft itself. But as to the vein matter contained in the crevice the statute is silent. This could only be determined by some scientific process, not perhaps accessable to the locator, and hence the statute made no requirement in regard to it. Whatever is required in this regard must be added by construction to the plain letter of the statute. It is true, as before stated, that the statute contemplates that the discovery shaft is sunk upon a lode, but whether at the particular spot where the lode is found, the same must be mineral-bearing, or, if mineral-bearing, to what extent, the statute is silent. To say, as the Court did say in Bryan v. McCaig (10 Colo., 309), and the Court of Appeals said in Fleming v. Daly (12

Colo. App., 439), and the United States Circuit Court in Terrible Min. Co. v. Argentine Min. Co., (89 Fed., 583), that the crevice in the discovery shaft must contain mineral-bearing rock in place, would be correct only where, as in those cases, the locator is relying alone on such shaft both for his well-defined crevice and his discovery of a mineral bearing lode or vein. We submit, therefore, that instructions one and ten described a valid discovery shaft, which, when taken in connection with other discoveries of a vein or a lode, within the limits of the claim, would make a valid claim. Of course, shafts 2 and 3 were not sunk until after the location of shaft one; but, if they were sunk before defendants made a discovery they perform the same office and have the same effect as though sunk prior to the location.

The alleged discoveries in the Tecumseh and Ophir claims present an entirely different state of facts. The Tecumseh relies on three discoveries in as many shafts while the Ophir has but one shaft. The Tecumseh relies on a well-defined crevice in its discovery shaft, while the Ophir has no crevice at all. The appellees, by their testimony, admit that the Tecumseh had a well-defined crevice in the discovery shaft, but claim either that it was not mineral-bearing, or that, if it was mineral bearing, the mineral was not rich enough, or continuous enough, to make the crevice a lode or vein; and that we cannot go outside of this shaft to show a discovery of mineral in aid thereof. As we have seen, the jury may have found that we made a perfect discovery in our discovery shaft in 1894, but

that the defendants made a discovery in their shaft in 1892. The whole case may have turned upon a finding that the Ophir had the first discovery, notwithstanding the jury may have believed that the Tecumseh had a perfect discovery in June, 1894, in its discovery shaft. We do not know how this issue was found, or upon what the verdict turned. The verdict was general, and, in such case, and where there were several issues upon which it may have been found, and any error has been committed at the trial in regard to any one of those issues, the verdict and judgment cannot stand.

In What Cheer Coal Co. v. Johnson (56 Fed., 810; 6 C. C. A., 148) the Court said:

"The verdict was general, and its generality prevents us from discerning upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried, and upon any one of them error is committed, in the admission or rejection of evidence, or in the charge of the Court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling."

The same point has been adjudicated in many cases. (St. Louis I. M. & S. Ry. Co. v. Needham, 63 Fed., 107; 11 C. C. A., 56; Spring Valley Coal Co. v. Patting, 86 Fed., 433; 30 C. C. A., 168; State of Maryland v. Baldwin, 112 U. S., 490). The question then arises as to whether any error was committed in the giving or refusing instructions, or in the admission or rejection of evidence, as to any issue upon which the verdict of the jury may have been founded.

We have already discussed the alleged error of the Court in refusing instructions 1 and 10 which

had distinct reference to our discovery shaft, and the giving of instruction 21 which excluded from the consideration of the jury the veins discovered in shafts 2 and 3. The Court, instead of giving instructions applicable to these different claims, shafts and alleged discoveries, worded its instructions in such a way as to require the jury to test the discovery claimed by both parties by certain abstract definitions and rules of law. These instructions were numbered 3, 4, 5, 6 and 16 and are set forth in the statement of the case.

Instead of telling the jury that if they believed or did not believe certain facts in regard to first one shaft and then to the other (referring for the recited facts to the evidence in the case and the claims of the parties respectively) and telling them that as they believed or did not believe the recited facts they would find on the question of discovery in the different shafts, the Court required the jury to take these abstract propositions of law and apply them, together with the evidence, to shafts and discoveries that were altogether different in their nature, and depended upon different evidence and distinct principles of law. What clauses, or phrases, or sentences contained in these five instructions applied to one shaft, and what to another and what to neither? The jury had to dissect and analyze them and apportion them to the different sides of the case, and the evidence as it applied to the different claims, before they could know anything about what the Court had declared the law to be upon any issue of fact involved in the evidence. Before these in-

structions can be sanctioned in this abstract form the Court has to overrule a line of its former adjudications.

But passing the question of form we desire to note a few particulars in which these instructions are erroneous, misleading and wholly inapplicable to any state of facts presented by the evidence. (1) The Court tells the jury in the beginning of instruction 4 that a vein or lode must be found in the discovery shaft. This instruction No. 4, in violation of the plain letter of the act of Congress, requires the vein or lode to be discovered in the discovery shaft, and thereby excludes any consideration of any vein discovered elsewhere. (2) In instruction No. 5 the Court tells the jury that a vein may be *discernable by assay only*. Even if it were true that this test would be allowed as the means of determining the existence and limits of a lode or vein, can it be allowed as the test to discover the existence of a well-defined crevice? Is there no difference between a lode or vein and a crevice? We affirm that there is. We maintain that a crevice is sometimes more than a vein and sometimes something less than a vein. Our State statute is first whistled down and then whistled up by these instructions. Counsel on the other side involve themselves in the most glaring inconsistencies. When we tell them that we have a well-defined crevice in the Tecumseh discovery shaft that any one can go and see and that their own surveyors plainly trace on their maps, they tell us this is not sufficient; that we must show that this crevice also contains a vein or lode. When we ask them to

show us the crevice which contains their lode or vein they say in effect, "give us Doll to pick down and salt the rock and we will show where our crevice is by assay." They appeal to our State statute in one breath and repudiate it in the next. What does our statute mean? Does it mean anything? We know what it says. It is couched in plain, unambiguous language. What need, then, is there for construction? What right, moral or legal, has the Court below to disregard its plain terms? Counsel on the other side will say that it means just what the same terms meant when used in the miners' regulations. We will accept this suggestion, meet them upon their own ground and consider these regulations as quoted in their own brief in the Court below.

One of these regulations provides that "a hole or shaft shall be sunk on the same *to the crevice* thereof" (brief, p. 14). Another provides that a claim "shall be considered as real estate when the *crevice is found*" (*Id.*, 14). Another provides for a person having certain rights "after having *struck the crevice*" (*Id.*, 16). Another gives certain time to "develop his crevice" (*Id.*, 16). Another regulates claims "*without any regular crevices*" (*Id.*, 18). Several of these regulations require a locator not only to *develop his lode* but "*also* he shall *develop his crevice*" (*Id.*, 16, 18). Another provides that "any person discovering a *new lode* shall dig until he find the *crevice* sufficient to *show the course* of the lode" (*Id.*, 21). Another provides that "the person or persons *discovering a lode* shall *find a crevice* before he can have it recorded" (*Id.*

22). Another declares that "no party shall be entitled to hold a discovery until said party shall have made an *actual discovery of the crevice*" (*Id.*, 22). Another says that *discoveries or lodes* shall not be recorded until the *crevice is found* and gold or other precious metals is found therein by washing or otherwise" (*Id.*, 23). Another provides for time to file "after *striking the crevice*," * * "but no record of any claim shall be valid unless the *crevice shall be opened and well-defined*" (*Id.*, 25).

These regulations draw a clear distinction between a *lode* and a *crevice*. A lode may be discovered before the crevice is found. *Every lode has a crevice.* It was the plain, visible, actual crevice that had to be "found," "struck," "developed," "shown," "opened," "well-defined" and "actually discovered" according to the varying phraseology of these regulations. It was in the light of these regulations that our statute was passed requiring that a discovery shaft should be sunk "*upon the lode*" deep enough "*to show a well-defined crevice.*" Here the same distinction between a lode and a crevice is clearly preserved. It was not sufficient to discover a lode. The lode might be discovered; but, before location, and as one of the acts of location, the shaft must be sunk on the lode deep enough to show a well-defined crevice.

By the instructions given by the Court below every vestige of the distinction between a lode and a well-defined crevice is stricken down. By instruction 5 this well-defined crevice is found when the difference between the walls and the mineral-bearing rock can be *established by assays.* This

language might apply to the broad and comprehensive definition of a lode, but not to that of a well-defined crevice. By instruction 16 a silly excuse is given for the violation of the statute. It is said that if the plain meaning of the statute is not disregarded some blanket or horizontal bodies of mineral could not be located. But this violation is the exercise of legislative power. If our statute does not apply to all kinds of mineral bodies legislation should be invoked and not false construction. The plain language of a statute should never be distorted in order to extend it to something not in contemplation when it was adopted. But if a statute is to be strained to meet an unforseen emergency it should be only done for that purpose. In the present case there is no room for the doctrine *ab inconvenienti.* All the evidence shows that every body of ore in the Cripple Creek district has been found in well-defined crevices. Every vein is a fissure vein. There are no blanket veins or other irregular deposits. The Ophir vein, when it was reached at a depth of 34 feet was a true fissure. At that depth a well-defined crevice was found. The plain letter of the statute is distorted to the end that it may be said that this crevice was found at a point nine feet above where it was actually found. The discovery of a vein cannot be proven by subsequent development. (Upton v. Larkin, 5 Mont., 600; same case 7 Mont., 449.) There is no pretence that any well-defined crevice was actually found in the Ophir shaft prior to the resumption of work in 1895. The entire cause was tried on the theory that there were signs and indi-

cations of the proximity of a vein higher in the shaft than 34 feet—the point at which the crevice became visible. Does any one suppose that the miners who made regulations, and the legislators who passed our statute, had in mind a crevice that could only be detected by assay? We think not, and we do not think that this Court can give this statute any such construction. The cases cited by the Court (Cheeseman v. Shreeve, 40 Fed., 787; Hyman v. Wheeler, 29 Fed., 347; Iron Silver Min. Co. v. Cheeseman, 116 U. S., 529), did not undertake to to construe or enforce this State statute. The Court, in those cases, simply defined a vein or lode; but utterly ignored our statute that requires, in addition to the discovery of a vein or lode, that the discovery shaft shall be sunk *on such vein or lode* deep enough to show the *well-defined crevice*. There is not a particle of evidence tending to show that the defendants ever "showed" in the Ophir shaft a well-defined crevice existing prior to our discoveries in 1894, and, hence, all instructions submitting any such issue to the jury were not based on evidence and were, therefore, erroneous.

VIII.

Annual Labor.

One of the questions raised at the trial was as to whether the defendants below had performed labor or made improvements of the value of one hundred dollars on the Ophir claim for the year 1897. For defendants, Mr. Skipworth testified that he ran a drift seven or eight feet, and that it was

worth twelve dollars per foot to do so. This would be less than one hundred dollars. Mr. Cone testified as to what he *paid* for this work, and made the amount more than one hundred dollars; but this was not legal evidence (Quinby v. Boyd, 8 Colo., 194; s. c., *Id.*, 432).

The act of Congress provides that—

"On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Under the plain letter of this act, the true test is the "worth" of the labor or improvements, and not what was actually paid therefor. There was not a scintilla of evidence that this labor was worth one hundred dollars, while there was conclusive evidence that it was not worth more than fifty-six dollars. There was, therefore, no evidence to sustain the verdict. The verdict recited:

"And we further find that they have established their title and right to the possession and occupancy of the premises in controversy by reason of a full compliance with the acts of Congress and the laws of the State of Colorado relating thereto."

The Supreme Court of Colorado places its decision on this point upon three grounds: (1) That there was some evidence that this labor was worth one hundred dollars. (2) That an instruction given by the trial Court to the effect that the

law presumes that such labor was performed was correct. (3) That in the absence of a relocation it is wholly immaterial whether any annual labor was performed or not. We think the Court erred on all of these points, for the reasons: (1) There was no legal evidence that the labor for 1897 was worth one hundred dollars. (2) There is no legal presumption that labor to this amount was done. It is incumbent on an applicant for patent to show a compliance with the statute (Rev. Stat., Sec. 2324) in regard to annual labor (8 L. D., 505). The pending of an adverse claim, *before entry*, does not excuse the non-performance of annual labor (Sickel, 371; Morrison Min. Rights, 10th ed., 427).

Under the act of Congress of March 3, 1881, authorizing the jury to find that the title to the ground in controversy has not been established by either party, each party must *affirmatively* establish his right and title. This cannot be done by presumption. The act provides:

> **"That if in any action brought in pursuance of section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be extended according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the Land Office, or be entitled to a patent for the ground in controversy, until he shall have perfected his title."**

To say that, under the above act, the important fact of the performance of annual labor may be established by a presumption, is inconsistent with the former decisions of the Court below (Becker v. Pugh, 9 Colo., 589; Bryan v. McCaig, 10 Colo., 309; Gerard v. Carson, 22 Colo., 345), and

operates as a nullification of the act of Congress requiring each party to establish his title. And for the Court below to say that annual labor need not be performed, after a valid location has been made, in order to be entitled to the verdict and judgment which were rendered and entered in this cause, was to nullify the other act of Congress referred to, which requires such annual labor until patent has issued. Some Courts have held that annual labor need not be performed after entry, because the patent, when issued, relates back to the entry; but in this case no entry has been made. But, whatever view may be finally taken of this question, there can be no doubt but that its proper solution requires a construction of these acts of Congress, and that they were construed, either expressly or impliedly, by the Court below, adversely to plaintiff in error. This is all that is required to give this Court jurisdiction.

In our original opening brief in the Court below, on pages 31 and 32 we said:

"The twenty-second instruction may be disposed of by reference to what has been said in regard to the twentieth instruction. The twenty-third instruction contained what may be regarded as a correct statement of the law applicable to the labor and improvements required to preserve a locator's right to a mining claim, but the twenty-fourth instruction applicable to the same subject is erroneous. A lode mining claim is held by the performance of annual labor (Johnson v. Young, 18 Colo., 625-627). It would seem, however, that the failure to do such labor, in order to work a forfeiture in favor of an overlapping claim, must be taken advantage of by a relocation (Oscamp v. Crystal River Mining Co., 58 Fed., 293). Nevertheless, it is clear and certain that a verdict can not go, in an adverse suit, in favor of a party

guilty of such failure, unless it is shown that work has been resumed prior to the trial of such adverse suit. The failure to do annual labor need not be pleaded (Bryan v. McCaig, 10 Colo., 509), and it was not pleaded in this case. The evidence shows without any conflict that the defendants failed to do annual labor for the year 1897 of the reasonable value of $100. The verdict upon this point is not supported by the evidence to such an extent as to place the question beyond the control of this Court. While the person pleading a forfeiture must assume the burden of proof (Johnson v. Young, 18 Colo., 625), this rule has no application under the statute requiring the jury to find against both parties if neither has established a title. This instruction can not be reconciled with the other instructions of the Court by which it compelled both parties to establish their respective titles to the mining claim in controversy. The law upon this subject was correctly stated in the twenty-sixth instruction given by the Court."

In this same brief (pages 84-87) we further said:

"The ninth ground of the opinion of the Court overruling our motion for a new trial relates to assessment work done by the defendants on the Ophir claim for the year 1897. This assessment work was performed at the end of a drift running south from the shaft. The Court rests its opinion on the testimony of Mr. Cone and Mr. Skipworth. Mr. Skipworth testified that he ran this drift about seven or eight feet, and that it was worth $12 per foot to do so. Mr. Cone testified, not as to what the work was worth, but as to what he paid for it. Mr. Cone's testimony was not legal evidence (Quinby v. Boyd, 8 Colo., 194; s. c., *Id.*, 342.) Mr. Skipworth's testimony did not show assessment work to the value of $100. They did not hoist any more material than they broke down in doing this work, and the estimate of $12 per foot on eight feet of drifting would not make $100. The Court then allowed the jury to find, on the testimony of Cone, that he paid more than $100 for this work, that it was of the value of $100, notwithstanding his own witness testified that its value was less than that sum. This was illegal, even though there had been no other testimony introduced on the subject. Mr. Cone testified that he paid $7 a foot for sinking the Ophir shaft (record, p. 123). Edward Carr

testified in regard to this work as follows: 'I examined the work that was done upon the Ophir lode since January 1, 1897, up to the present time. I measured it yesterday. It would square up possibly seven feet long by four feet wide and six feet six inches high. I have worked the last two years practically all the time in the Cripple Creek district in driving drifts and doing work of that kind. I know the reasonable value, the cost of doing that kind of work in that kind of ground at that place, on that hill. It would be worth about $8 a foot to do the work and hoist the material' (record, pages 118 and 119). On cross-examination, he stated: 'I measured the work done in the Ophir shaft in 1897 with a tape line. I knew where the work began. I have been in there a number of times before the work was done.' Mr. John W. Carr testified: 'I have done several hundred feet of work in the immediate locality of the Ophir drift. The rock in the Ophir drift is the same as the rock in the drift in shaft No. 4 in the Tecumseh on the same level. The reasonable value of breaking and hoisting such rock as is found in the south drift from the Ophir shaft would be about $8 per foot; * * * $8 per foot would be the reasonable current value of the work. Drifting is less expensive than sinking' (record, page 122).

We submit that there is no evidence in this record that forms any just basis for the verdict of this jury. The verdict recites: 'And we further find that they have established their title and right to the possession and occupancy of the premises in controversy by reason of the full compliance with the acts of Congress and the laws of the State of Colorado relating thereto' (record, page 165). To this verdict, an exception was duly entered (record, page 166). It may be that the failure to do this assessment work would not inure to the benefit of the plaintiff in the absence of relocation, made subsequent to the forfeiture. We may also concede that the defendants could restore the continuity of their title by resuming work within a certain time and before the forfeiture had been taken advantage of by a relocation. But in an adverse case where each party pleads his title, and where the verdict of the jury must be against both parties unless one side or the other establishes a title, a verdict of this kind can not go in favor of the party who has not kept up his annual assessment

work. This point is not technicality. The question as to whether this work was done is one of substantial merit. Mr. Cone himself testifies that in view of the fact that this claim was in litigation, and the further fact that this Ophir shaft did not pay for working, he only intended to do just enough upon the claim to cover the annual assessment work. In 1893 and 1894, defendants did nothing. They took advantage of the act of Congress and filed a statement in lieu of work. The aggregate amount of work done upon the Ophir claim would scarcely amount to the annual assessment work since the location of the claim. On the other hand, the plaintiffs have performed labor and placed improvements on the Tecumseh claim of the value of between $12,000 and $15,000 and were working the property continuously until stopped by an injunction in this case. Under all these circumstances, we can see no reason that should impel the Court below or this Court to sustain a verdict that is not supported by a *scintilla* of evidence. The verdict is not only not supported by any evidence, but there is clear, certain and cumulative evidence against it, upon this question. The defendant pleaded its title and alleged the performance of assessment work from year to year. This was denied by the plaintiff. It is true that these issues were made before the time for doing the assessment work for 1897 had expired. But in an adverse suit, it is not sufficient for either party to prove title down to the time of making all the issues in the pleadings, but must, in order to entitle him to a verdict of the character of the one rendered in this case, show a compliance with the act of Congress up to the time of the trial of the cause. Upon this question, there is no presumption one way or the other. If we were asserting a technical forfeiture, the burden would have been upon us to show it. But we are not. We are in a position, however, to raise the question as to whether the defendants have made out their case; and, if the question were not raised by us, it was the duty of the Court below, and it is the duty of this Court, to require proof from the defendant upon this vital question before sustaining and sanctioning this verdict."

The references to the record in the above quotation are to the original printed abstract in the

Court below. The Court necessarily overruled our contention when it said in its original opinion:

"It is sufficient to say that there is evidence *tending to prove every material issue tendered by the appellees.*"

In determining a petition for a rehearing the Court said:

"It is asserted that the evidence is insufficient to establish the fact that the assessment for the year 1897 was performed on the Ophir. A witness on the part of appellees testified that he had extended a drift on the Ophir, on account of the assessment work for 1897, a distance of seven or eight feet; that this drift was worth $12 per foot. For this labor appellee appears to have paid the sum of $90. For additional work he paid for two days' work at the rate of $4 per day, and later, for further work, $18. This, in addition to paying for the powder, fuse, steel and candles that were used in working the assessment. There may have been some evidence to the effect that the work was not worth the amount paid, but this was a question for the jury to determine, and as it has been determined in favor of appellees, upon evidence sufficient to sustain it, the finding on this subject will not be disturbed.

On the subject of annual labor, the Court, by instruction No. 24, directed the jury as follows: 'Upon this point the Court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and the plaintiff claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon, is on the plaintiff, and unless he has shown you, by a fair preponderance of the evidence, that the work was not done, you are to determine that question in favor of the defendants.'

The objection urged to this instruction is, that it cast a burden upon the appellant which he was not required to assume. The evidence tended to establish that a valid location of the premises in dispute had been made by appellees. This location was prior to the only one under which appellant can base any claim. The act of Congress (Sec. 2324, Rev. Stat. U. S.) provides that a failure to perform the necessary annual work shall render a claim open to relocation, provided the original locators have not re-

sumed work upon the claim after failure and before relocation. The fair construction of this provision is, that as between the locator and the general government, the failure to do the annual assessment work does not result in a forfeiture. In other words —it is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a *prima facie* case is made on the part of the original locator by showing a valid location. (*Hammer* v. *Garfield M. Co.*, 130 U. S., 291.)

To otherwise express our views, it might be said, that after a valid location, the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned. (*Renshaw* v. *Switzer*, 15 Mining Reporter, 345; 6 Mon., 434; 13 Pac. Reporter, 127.)

It is the location by the new claimant, and not the mere lapse of time which determines the right of the original locator. (*Little Gunnel G. M. Co.* v. *Kimber*, 1 Morrison's Mining Reports, 536.)

So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. In so far, then, as the rights of appellant depended upon the failure of appellees to perform the assessment work for 1897, it was encumbent upon him to establish this fact by a fair preponderance of the evidence, or, as the Court stated, the burden of proof was upon him to show that the work for 1897 was not, in fact, performed. (*Hall* v. *Kearny*, 18 Colo., 505; *Johnson* v. *Young*, 18 Colo., 625; *Hammer* v. *Garfield M. Co.*, *supra*.)" (Record, folios 755-757; Beals v. Cone, 27 Colo., 473, 500.)

It is an absolute mystery to us as to how it is possible that record facts can be so thoroughly misconceived as to make the above statement possible in the administration of justice. In order to demonstrate the fact of such misconception we will set forth literally all the evidence there is in this

record upon the subject of the worth of the annual labor performed upon the Ophir claim in or for the year 1897.

SKIPWORTH, on direct examination, testified as follows:

"Q. Have you ever made any personal examination or inspection of the properties in controversy? A. I done the assessment work on one of them and looked at the other and inspected it a little.

Q. Which one did you do the assessment work on? A On the Ophir.

Q. That was in 1897? A. Yes, sir; and part of it this year, it ended up.

Q. Do you mean in 1897 or 1898? A. Partly in both.

Q. Beginning at what time? A. Beginning last December, and I think it ran over three days in this month, or three days in January I finished it.

Q. Whereabouts was that work done? A. In the bottom, in the south drift; I simply ran the south drift further ahead.

Q. About how many feet did you run it? A. I should judge about seven or eight feet.

Q. Is it blasting rock? A. Yes, sir.

Q. Hard material? A. Yes, sir; it is tough and spongy.

Q. Did it involve the hoisting of the waste to the surface? A. Yes, sir; we didn't raise it; we hoisted what had been broke the year before.

Q. Did you hoist any to the surface? A. Yes, sir; we hoisted four days to start with.

Q. That consisted of material which you broke or that had been broken? A. That had been broken.

Q. That you wanted to get out of the way? A. Yes, sir (record, folios 362, 363).

Cross Examination.

Q. You ran a drift for the Ophir people, you say, about seven or eight feet? A. I should judge that; it is the assessment work for the last year; I never measured it; I simply guessed at it; it might have been a foot more or a foot less.

Q. How many feet did they pay you for? A. They didn't pay me by the foot; they paid me by the day.

Q. What did you run that for per foot? A. I would not want to take it for less than about twelve dollars, the way it was breaking; it was spongy and tough—that is, to break it and hoist it.

Q. You finished that work on what day? A. I think it was about the 3rd of January. I was paid for three days in January; I finished on the third day of January.

Q. Did you hoist as much material as you broke down? A. I should judge it was just about the same.

Q. In other words you hoisted about enough to take the place of what you broke down? A. I judge that whoever done the work the year preceding had thrown their dirt back, and we left just about as much as we hoisted; we simply drifted and broke the rock and threw it back behind; it is there today; I suppose it is; it was the last time I saw it.

Q. How many days did you work there in December? A. About fifteen. I was there longer than that, but I was off several days; I was down here as a witness in Court on an election contest; I was there fifteen days in December and three days in January.

Q. Did it take that many days to run seven or eight feet? A. Yes, sir.

Q. Eighteen days to run eight feet? A. Yes, sir.

Q. Less than six inches a day? A. Yes; and there is lots of rock in that camp you would be doing pretty well to do that in.

Q. Isn't it very easy to let contracts for running a drift of that kind and hoisting material at ten dollars a foot? A. Yes. and it is very easy for a man to get stuck on it, too.

Q. Twelve dollars a foot is about as high as is paid there for doing that kind of work, isn't it? A. Yes; I don't know of any contract being let; in fact, it is something I have not done for quite a while, to work on contract.

Q. A great deal of work there is done by contract, isn't it? A. Yes, sir; there is not much work done in shipping mines by contract; most of that work is done by days' work, unless they have some outside work to do.

Q. How much of that seven or eight feet was run in three days in January? A. Probably about a foot.

Q. About a foot? A. Yes; probably not that much; I believe they stopped us early in the afternoon of the 3d, and told us to bring our tools over, that we had done all the work they wanted (record, folios 368, 369).

Re-Examination.

Q. When you were down here, you were down here two or three days while this work was going on, did you put a man in your place? A. Yes, sir.

Q. In doing this work did you furnish your own powder and fuse, or was that furnished by the company? A. It was furnished by the company.

Q. Do you know how much was furnished during the time you were there? A. I know there was plenty of it; I always had plenty of it.

Q. Enough for the purpose? A. Yes, sir" (record, folios 376, 377).

This testimony clearly shows that in December, 1897, and the first three days of January, 1898, by way of doing assessment work for 1897, a drift was run *about* seven or eight feet. The witness said that he worked by the day, but that he "would not want to take it for less than *about* twelve dollars" per foot. Upon this statement the Court says:

"A witness on the part of appellees testified that he had extended a drift on the Ophir, on account of the assessment work of 1897, a distance of seven or eight feet; *but that this drift was worth $12 per foot.* For this labor appellees appear to have paid the sum of $90."

Can not this Colorado Court see the difference between the statement of the witness and its own statement of his testimony? If not, then God help the litigants who come

before it, and who must finally abide by its rulings. The witness actually said that *he* would not want to take a contract for less than *about* $12 per foot, and the Court says that he said it was *worth $12 per foot*. The statement of the witness was not legal evidence. It was wholly immaterial what he would personally want to do. The issue, under the act of Congress (R. S., section 2324) was whether one *hundred dollars' worth* of labor had been performed in or for 1897. The question was as to the *actual value* of the labor. The witness virtually admitted that he knew nothing about the contract price of such work. But $12 per foot for eight feet (the highest estimate made by any witness) would be only $96.

Mr. Cone, one of the defendants in error, testified:

"Q. What, if anything, do you know about the doing of the work upon the claim in 1897, the assessment work? A. In 1897 I paid for labor in December $90, and for two days' work of my shift boss at $4 a day, $8, besides the powder and fuse and steel and candles that were used in working the assessment; I also paid in January for three shifts of two men each, making $18 additional.

Q. Have you any knowledge of the approximate value of the candles, powder and fuse used? A. We estimated it at about $1.50 a day for two men.

Q. Is that a fair estimate? A. Yes, sir; I think that is a fair estimate.

Cross-Examination.

Q. What was the aggregate amount you paid for that work in 1897? A. $116, beside the material used.

Q. You hired this gentleman who was a witness in this case, to do this work, did you? A. In 1897?

Q. Yes? A. Mr. Skipworth?

Q. Yes? A. Yes, sir.

Q. Didn't you go to see how much work he was doing? A. I was at the shaft; I didn't go into it.

Q. Were you entirely indifferent as to how much work they did there? A. No, sir.

Q. Just so that you paid them over $100? A. I had a thorough superintendent whom I knew would see that they did all the work that was necessary.

Q If they only did seven or eight feet of work, you paid rather too much, didn't you? A. That depends a good deal on the character of the rock that is broken; some of the rock on that hill is very difficult to break.

Q. You paid Johnson $7.00 a foot for sinking there, didn't you? A. Yes, sir.

Q. The same kind of rock, was it? A. I don't know that it was.

Q. I put it in the form of a question, whether it was about the same as the drift? A. I don't know that it was.

Q. Was it, or was it not, in your opinion, about the same kind of rock? A. I say I have no knowledge on the subject; I know Johnson and Mears did not make any money out of the contract.

Q. What was the reasonable value of 8 feet of work, drifting in that drift, and hoisting the same amount that was broken down; can't you readily let contracts for seven or eight dollars a a foot? A. I don't think so; no, sir.

Q. What would be the reasonable value of it? A. That would depend entirely on the character of the rock.

Q. Don't you know in your own mine there, your own shaft, what the rock is? A. I never was in the Ophir shaft in my life.

Q. So you have no opinion as to what a fair contract would be for doing a certain number of feet on that claim? A. Not from my own personal observation.

Q. You did no other work on the claim in 1897 except this that was done by Mr. Skipworth, did you? A. I think not, except the work we did at the time we prepared it for examination; nothing in the line of development" (record, folios 493-5).

Upon this testimony the Court says:

"For additional work he paid for two days' work at the rate of $4 per day, and later, for further work, $18. This in addition to paying for the powder, fuse, steel and candles that were used in working the assessment."

By this statement a *purely fictitious* case is manufactured. By it the Court asserts that Mr. Cone paid eight dollars in one instance, and eighteen dollars in another instance, for "*additional*" and "*further*" work, by which the Court clearly means *other* and *different* work than the running of this drift seven or eight feet. The $8 was for two days' work of a shift boss while overseeing the running of this drift, and the $18 was for three days' work in January by two men who completed this drift to a distance of seven or eight feet. Mr. Cone, in the closing sentence of his testimony above quoted, says that no development work was done for 1897 except this done by Skipworth in running this drift.

The Court further says:

"There *may have been* some evidence to the effect that the work was not worth the amount paid, but that was a question for the jury to determine, and as it has been determined in favor of appellees, upon evidence sufficient to sustain it, the finding on this subject will not be disturbed."

The Court says there *may have been*, etc. Why this evasion of the truth? We have quoted from one of our briefs in which the *direct and positive testimony of several witnesses* was set forth to the effect that $8 per foot was a *reasonable* price for running this drift and hoisting the material. We will quote from the record some of this "*may have been*" evidence.

Edward Carr testified:

Q. Have you examined the work that was done upon the Ophir lode during the year 1897, or from the first day of January, 1897, up to the present time? A. Yes, sir.

Q. What work was done there during that period of time?

Defendants object; there is no forfeiture pleaded or failure to do any work in 1897, and no relocation made by virtue of that forfeiture.

THE COURT: Do you want to show a forfeiture?

GEN. JOHNSON: They introduced proof to show that they had done it, and this is to rebut whatever purpose they had in view in introducing that.

Objection overruled, defendants excepting.

A. The only work that has been done of any moment, was in a drift in the south end of the south drift; they ran a drift there, possibly seven feet, and about six feet and a half long; it may possibly square up seven feet.

Q. Seven feet in length by what dimensions? A. About four feet wide and over six feet high, about six feet six inches.

Q. When did you measure that work? A. Yesterday.

Q. What is that work reasonably worth per foot?

Defendants object because incompetent. Objection sustained, plaintiff excepting.

Q. What experience have you had in the Cripple Creek district in driving drifts and doing work of that kind? A. I have worked during the last two years practically all of the time.

Q. Do you know the reasonable value or cost of doing that kind of work in that kind of ground at that place on that hill? A. I think I do; yes, sir.

Q. What would you say that drift you are speaking of, of the size mentioned—what would it reasonably cost to do the work there and hoist the material, per foot? A. I would consider it worth about eight dollars a foot.

Q. You may state whether or not, in your judgment, you could contract to have that kind of work done for that, or would be willing to contract to do it for that?

Defendants object, being incompetent and immaterial. Objection sustained, plaintiff excepting (record, folios 567, 568).

Cross-Examined.

Q. When did you go down and examine the amount of work that had been done in regard to the assessment of 1897? A. I've been down there once or twice; I was down there yesterday evening.

Q. Who told you to go down and measure? A. My brother.

Q. Did you get another letter from your brother? A. No, sir.

Q. How did you communicate with him? A. By telephone.

Q. What did you measure with? A. A tapeline.

Q. You said that the distance was possibly seven feet or six and a half feet long; which was it? A. I can't swear exactly.

Q. Why can't you? A. Simply because the face of the drift is not square so that you cannot take the mathematical linear length of the drift; you have got to square it up and make a sort of estimate of the face.

Q. Did you know where the work began? A. I knew about where it began, yes.

Q. Did you know where it began? A. I knew within a few inches.

Q. How? A. I have been in there a number of times before this work was done and I knew the shape of the drift and about where the work must have begun.

Q. You made a guess of it, in other words? A. No, I didn't.

Q. Will you swear that you began to measure the work at the point at which this work commenced? A. Not exactly, the point, no, sir.

Q. Will you swear that you came within a foot of it? A. Yes, I would.

Q. You think you did? A. Yes, sir (record, folios 575, 576).

J. W. Carr testified:

Q. Are you familiar with the kind of rock that is disclosed in the discovery shaft and in the drift from it? A. Yes, sir.

Q. What experience have you had in running drifts and sinking shafts and contracting for such work upon that kind of ground? A. I have done several hundred feet of work in that immediate locality.

Q. Is the material in that shaft different from what it is in shaft No. 4? A. Not on the same levels, no, it is not.

Q. How is it with reference to depth, does it get harder or softer ground as you go deeper? A. No, the best breaking ground we have is in the bottom of the 180-foot level.

Q. What would be the reasonable value of the work of breaking and hoisting rock such as is found in the south drift from the Ophir shaft, calculated per foot?

Objected to, being irrelevant, immaterial, incompetent and not rebuttal. Objection overruled, defendants excepting.

A. I should think about $8 a foot; I will contract on the same level——

Defendants object; objection sustained.

Q. Did you ever do any contracting for that kind of work at that rate?

Defendants object, being incompetent and immaterial; which objection was by the Court sustained; to which ruling of the Court the plaintiff then and there duly excepted.

Q. Would that be the reasonable current value of that work? A. I think so; yes, sir.

Q. $8 per foot? A. Yes, sir.

Q. I will ask you to state whether or not drifting is not less expensive than sinking? A. It is.

Q. About what difference do miners and contractors make between sinking and drifting?

Defendants object, being immaterial and irrelevant; which objection was by the Court sustained; to which ruling of the Court the plaintiff then and there duly excepted" (record, folios 581, 582).

We do not ask this Court to weigh *conflicting* evidence. We submit that the evidence is positive that no work was done upon the Ophir claim except to extend this drift; that no witness has estimated this extention at more than eight feet; that no witness has said that this work was worth $100,

while two witnesses have said it was worth only $8 per foot—making the extention worth $64. All that stands against this is the statement of Mr. Cone that *he paid* $116 for the work. As to the *value* of the same he could give no estimate.

We repeatedly appealed in vain to the Court below to respect the act of Congress, as well as its own former decisions, upon this subject. The act of Congress makes the *worth* of the annual labor the true test, irrespective of the *actual cost* of it. In Quinnby v. Boyd (8 Colo., 194), the Court, on pages 208 and 209, said:

"And while the amount paid is not conclusive that work of that value has been done, but the actual value thereof is the true test whether or not the law has been complied with, it is proper to consider whether there has been a *bona fide* attempt to comply with the law."

In this same case, on rehearing (8 Colo., 342), the Court said:

"As stated in the opinion, the only question about which we entertained any doubt was the sufficiency of the testimony to support the verdict of the jury as to the performance of the annual labor required by law, for the year 1880, and we are still of the opinion, in view of the whole testimony, and the repeated verdicts for the plaintiff, that we would not be warranted in reversing the cause. While the testimony of the plaintiffs below was mainly directed to the point that the price paid for the work performed was a reasonable price for work of that character and extent, when done on contract, yet there was some evidence tending to show its *actual value*, and that it came up to the *legal standard*"

It is too plain for argument that the act of Congress means, and these decisions of the lower Court mean, that the cost of work, or even what would have to be paid on contract, for such work,

is not the test. The question is, what is the *actual value* of the work. Cone disclaimed knowing anything about its actual value, and could only say what he paid. Skipworth only stated about what he would want to do it for. Two witnesses testify positively that it was worth but $8 per foot, which, upon the highest estimate of any witness as to the number of feet, would make the value of the work $64. In this condition of the record we respectfully submit that there is no evidence that the actual value of the work done upon the Ophir claim in or for 1897, equalled $100.

The trial of this cause commenced on February 9, 1898 (record, folio 22). Edward Carr testified that he examined the Ophir and measured the work that had been done in 1897 and up to the night before he testified. This, together with the testimony of Mr. Cone, makes it clear and certain that the defendants in error had never resumed work upon the claim after failure to do the work for 1897. So that this trial was had, this verdict was rendered, and judgment was entered, while defendants were in default as to the annual labor for the *preceding year*.

But the Court says that all of this makes no difference; that it is wholly immaterial whether defendants ever performed any annual labor for any particular year or not; that if they once made a valid location their title was perfectly good, as against the Government, and any one else except a relocator. In other words, the Court holds that a locator, in order to be entitled to a patent, need not comply with the act of Congress requiring $100

worth of labor to be performed, or improvements made, each year. This is an important question, and we are not advised that this Court has ever definitely pronounced upon it. To sustain this doctrine the Court below refers to Hammer v. Garfield M. and M. Co., 130 U. S., 291; Renshaw v. Switzer, 6 Mont., 464, and Little Gunnel Min. Co. v. Kimber, 1 Mor. Min. Rep., 536. The first case cited does not touch the question while the other two cases merely hold that it is the act of relocation that *terminates the right* of the locator who is in default as to annual labor, and that, until a relocation is made, the original locator can avoid forfeiture by *resuming work*. None of these decisions touch the question as to whether a party to an adverse suit can have a verdict and judgment in his favor, on which he can proceed to patent, when the evidence shows that he is in default as to his annual labor for the preceding year, and has not resumed work. These decisions were all rendered without reference to the act of Congress providing for a verdict being rendered against both parties, and thereby requiring both parties to show their titles, and not rely on the weakness of the title of the opposite party. As to the effect of this act Mr. Morrison says:

"The rulings under the above act are, that each party is practically a plaintiff, and must show his title; that there can be no nonsuit, but that if neither show title the verdict must be special—which is an assertion that the title remains in the United States, so far, at least, as the litigating parties are concerned. (*Jackson* v. *Roby*, 109 U. S., 440; *Rosenthal* v. *Ives*, 12 Pac., 904. *See verdict*, p. 423.) The effect of the act is to prevent a recovery

upon possession alone in ejectment supporting adverse. (*Becker* v. *Pugh*, 9 Colo., 589." Mor. Min. Rights, 10th ed., p. 418.)

It would seem that this Court, in Chambers v. Harrington (111 U. S., 350), contemplates that each party, in order to recover in an adverse case, must show that he has performed labor on his claim each year. Principles that would lead to the same conclusion are contained in Becker v. Pugh (9 Colo., 598). While annual labor need not be performed after entry (Alta Co. v. Benson Co., 145 U. S., 428), there would seem to be no doubt but that, prior to such entry, the performance of such labor is the condition upon which the Government allows the miner to hold the possessory title and to afterwards perfect it by patent. (Erhart v. Boaro, 113 U. S., 527; O'Reilly v. Campbell, 116 U. S., 418; Kramer v. Settle, 9 Mor. Min. Rep., 561.) As we have seen, the executive department of the Government has always required the applicant for a patent to show that he has performed annual labor for each year, including the year of the application. (Sickel, 371; 8 L. D., 505) This is in accordance with the plain letter of the statute. The statute (which we have set forth in the statement) is too plain to require or admit of construction. It should be taken as meaning precisely what it says. It declares that upon each claim, until patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. This is the broad, plain, affirmative declaration of the statute. The statute then proceeds to point out one of the consequences of a failure to comply

with the former provision, to-wit: That the claim shall be subject to relocation unless work has been resumed. This latter clause is now construed to render nugatory, for all other purposes, the general requirement of annual labor. The language, in and of itself, has no such effect. The purpose and policy of the statute does not admit of any such construction. If the intent of Congress was to grant the title to a mining claim solely on a discovery and a valid location it would have said so in plain terms. There would have been, in such case, no need of any requirement in regard to annual labor. The purposes of the requirement of annual labor were numerous. (1) To encourage a purchase of the land, which would dispense with the annual labor. (2) To develop the mineral resourses of the country. (3) To prevent the acquisition of large tracts of the mineral lands of the Government by the same person upon slight development and expenditure. None of these purposes could be fully conserved by a mere reservation in regard to relocation. Under the construction of the Court below a single individual could locate all the mineral lands of the United States, and as against the Government, be entitled to a patent, without any further development or expenditure. If he was sufficiently strong, as a bully, to deter other persons from relocating these mineral lands, he could hold them forever, and the mineral resourses of the United States would remain forever wholly undeveloped. The plain provision of the statute indicates that the Government, which owns these lands, for its own purposes,

and in its own interest, required, as a condition of its offer to sell, that the locator should do one hundred dollars worth of work each year on each claim; and, until such locator can come forward and show that he has complied with this condition, he is in no position to demand a patent, or to be entitled to a verdict and judgment upon which he can obtain the same.

We have no doubt of the correctness of the general proposition that the person who alleges, and claims title through, a forfeiture, should assume the burden of proof. But in this case the plaintiff did not plead a forfeiture, neither did he rely on the same for title. Indeed he could not have taken any direct benefit from a forfeiture without having relocated the ground. The defendants introduced evidence, by way of showing their own title, resulting from a compliance with the laws of the United States, to prove that they had performed annual labor for the year 1897. The plaintiff then, for the first time, introduced evidence to show that the defendants had not performed the annual labor for 1897, and had not *resumed work*. In this state of the case the Court gave instruction twenty-four. This instruction declares that

"The law does not presume a forfeiture by the failure to perform annual labor."

We think this statement was misleading at least. A jury might infer from it that the law presumes that the labor was done. We submit that the law makes no presumption one way or the other with reference to this subject. The instruc-

tion then proceeds to declare that the plaintiff was claiming that the Ophir lode became forfeited for the reason that the annual labor for 1897 had not been done, and the burden of proving that the annual labor was not done, was on the plaintiff, and unless he had shown, by a fair preponderance of the evidence, that the work was not done, the jury should determine that question in favor of the defendants. This is clearly equivalent to holding that the defendants in an adverse case need not, in order to entitle themselves to the kind of a verdict and judgment rendered in this case, make *any showing* in regard to annual labor. If the burden of proof is on the plaintiff in this case, and the plaintiff did not, as a part of his case (as in fact he did not), introduce any evidence on the subject of defendants' annual labor, then, according to this instruction, the defendants need not have done so. Is this the law?

In Thomas v. Chisholm, (13 Colo., 105,) the Court said:

"Defendants in the case at bar having recovered a general verdict in their favor, the judgment thereon must be reversed, unless the title of defendants to the ground in controversy was *legally established according to the act of Congress of March 3, 1881*, amending section 2326, R. S. U. S. *Since that amendment both parties in adverse proceedings are to be regarded as actors, and a defendant can not rely upon the weakness of the plaintiff's title*, as in ordinary ejectment cases. Consequently, in this action, defendants could not recover a *valid verdict and judgment* in their own favor without showing *compliance with the requirements of the statutes, State and Federal, such as would entitle them to a patent* from the United States. (*McGinnis* v. *Egbert*, 8 Colo., 41; *Becker* v. *Pugh*, 9 Colo., 589; *Manning* v. *Strehlow*, 11 Colo., 451.)

It follows, therefore, that defendants, in so far as they rely upon an entry and location by a corporation, must, *before they are entitled to such a verdict and judgment as they obtained*, aver the corporation was organized under the laws of the United States, or some State or Territory thereof, and that the members of such corporation were citizens of the United States, and severally and individually qualified and competent to make the location. As to what amount to *prima facie* proof of citizenship in a case of this kind, in view of section 2321, R. S. U. S., we intimate no opinion. (*McKinley* v. *Wheeler*, *supra*; *Lee Doon* v. *Tesh*, 68 Cal., 43; *Mining Co.* v. *Mining Co*, 1 Fed. Rep., 522.)"

The above cited case is parallel in its facts with the case at bar. The defendants had a general verdict and judgment and the plaintiff brought error. The Court reversed the judgment *wholly without reference to the title of plaintiff*, on the sole ground that the defendants had not shown such compliance with the statutes, State and Federal, as would entitle them *to a patent*.

In *Manning* v. *Strehlow*, 11 Colo., 451, the Court said:

"We are of opinion that the point made by plaintiffs in error is well taken and must be sustained. In *McGinnis* v. *Egbert*, *supra*, in construing the foregoing sections of the acts of Congress, we say: 'This section (2326) makes it the duty of a person to file an adverse claim against the issuance of a patent within thirty days thereafter, and to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession. As the law then stood, the party in whose favor the judgment was rendered became entitled to a patent. But the section was so amended by the act of March 3, 1881, that neither party was entitled to a judgment in his favor unless he was at the time of the adjudication entitled to a patent for the premises in controversy by virtue of a compliance with the mining laws. If neither party establishes such a right, the jury is required to find

that fact, and the proceedings in the Land Office are stayed until a title is perfected.' Technically speaking, neither party, in actions of this character, is possessed of the legal title, for that is in the United States. A possessory title is all that is possible under the circumstances. To entitle a party to a judgment in his favor, it must appear that he has not only the right of possession, but that he has made a valid location of the premises in controversy, and, by virtue of a compliance with all the requirements of the mining laws, *is entitled to a patent from the Government.* To this effect are the cases of *Gwillim* v. *Donnellan, supra,* and *Wolverton* v. *Nichols,* 119 U. S., 485. See, also, *Becker* v. *Pugh,* 9 Colo., 589."

In Becker v. Pugh (17 Colo., 243), the Court said:

"The act of Congress, providing for the trial in the courts of this and similar cases, provides, in case neither party establishes title in the premises in controversy, the jury shall so find and judgment shall be entered accordingly. Under this act it is clear that neither party shall be entitled to a verdict or judgment, unless his title to the ground in controversy be established (Becker v. Pugh, *supra.*) We will therefore examine the record and evidence for the purpose of ascertaining whether or not appellees have shown a sufficient title to the premises in controversy *to enable them to procure a patent* therefor from the government."

The principle of this long line of Colorado decisions was disregarded by the trial Court when it gave instruction No. 24, and by the Supreme Court when it affirmed such ruling. It was incumbent on defendants in order to obtain the verdict and judgment, given and entered in this cause, to show that they had performed annual labor for 1897, the year preceding the one in which this cause was tried, or, at least, being in default, that they had resumed work, and were going on to complete such labor. It is highly contradictory and inconsistent to say that the *burden of proof* rested on plaintiff to estab-

lish the negative of a fact that the defendants were bound to prove; and, it is legally impossible to say that without this erroneous instruction the verdict would have been the same.

In *Gwellin* v. *D nnellan*, 115 U. S., 45, this Court said:

"*To keep up and maintain a valid location, one hundred dollars' worth of labor must be done or improvements made during each year until a patent has been issued therefor.*" The Court then goes on to show that after a judgment shall have been rendered, the party in whose favor the judgment is entered is entitled, *without further notice or showing, to a patent.* And then further says:

A valid and subsisting location of mineral lands made and kept up in accordance with the provisions of the statute of the United States, has the effect of a grant by the United States of the right to present and exclusive possession of the lands located. * * * 'In this action the plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary. The question to be settled by judicial determination so far as he is concerned, is as to his own right to possession. He must establish a possessory title in himself good against everybody."

In Wolverton v. Nicholls (119 U. S., 485), the Court said:

"But whatever may be the effect of that statute in an ordinary action which has no direct relation to the proceedings under the act of Congress which we have referred to, we are of the opinion that, as applicable to such a case, the construction given by the Court is entirely too restricted. The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the Land Office, and the present suit is but a continuation of those proceedings, prescribed by the laws of the United States, to have a determination of the question as to which of the contesting parties *is entitled to a patent.* The act of Congress requires that the certified copy of the judgment of the Court shall be filed in

the Land Office and shall be there *conclusive*. And we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties."

The purpose of an adverse suit, according to these decisions, is to determine whether either of the parties thereto is entitled to a patent, and, if so, which one. Both parties are plaintiff as against the Government. The defendants made the first move by applying for a patent. The plaintiff then filed an adverse proceeding and instituted this action in support thereof. The plaintiff alleged his title, while defendants denied it and set up their own. A replication by plaintiff denying the title of defendants put the case at issue. Each party was called upon to establish the title asserted. The plaintiff made no claim of any title derived through a forfeiture or any relocation based upon a forfeiture. To cast upon the plaintiff the burden of disproving any essential link of the chain of defendants' alleged title was to misconceive the real purpose of the proceeding. There was no more shadow of reason for holding as the issues were framed, that the burden of proof was on plaintiff to show that the annual labor for 1897 had not been performed, than there was for placing the burden of proof on him to show that defendants had made no discovery of mineral, or that they had not properly staked off their claim. To place the burden of proof on plaintiff, as to any of these matters, is equivalent to declaring that defendants, in the absence of an attack, by evidence, introduced by plaintiff, as to such matters, need make no showing with reference to them. This is absurd.

There have been some intimations on the part of some Courts that the question as to whether a locator has acted in good faith can be taken into consideration in determining whether the statute requiring annual labor has been complied with or not. (Quinby v. Boyd, 8 Colo., 194, 209). We confess our inability to see how an intent to comply with the law can be substituted for a compliance, or weighed as evidence on the question as to whether or not there has been a compliance. But there is nothing in this record to show any *bona fide* attempt, on the part of defendants, to do annual labor, of the full value of $100 on the Ophir claim for the year 1897. On the contrary, Cone acted in a very reckless manner in regard to this work. He employed Skipworth to do the work. He wanted to use and did use this man on the trial then imminent. He was never in the Ophir shaft. There is no evidence that he had this work examined or reported on by any disinterested party. He does not say that any one ever informed him that work had been done of the value of $100. He seemed to be proceeding on the theory that if he paid more than $100 for the work he would be complying with the law. The record throughout shows that defendants were not working or developing the Ophir claim in good faith. No work was done between 1892 and 1895 (record, folios 488, 489). They had sunk the shaft for $7 per foot (record, folio 494). The undisputed evidence is that drifting is cheaper than sinking. The slightest examination, or inquiry, of Skipworth, would have developed the fact that a drift from

the bottom of the shaft had only been extended seven or eight feet, and that this was not worth $100. Cone testifies that he did not intend in 1896 or 1897 to do more than assessment work (record, folio 497). In 1892 the defendants applied for a patent for the Ophir lode, in connection with three other lodes. No work had been done except to sink a shaft 25 feet deep (record, folios 498, 499). The entire showing upon this application, in regard to having done $500 worth of work, was utterly false, and was found so to be by the Commissioner and Secretary of the Interior (record, folio 250). Cone testified that the reason for not intending to do more than assessment work was that the claim was in litigation (record, folio 517). This was not because of financial inability, for, in 1896 and 1897, the Doctor mine, owned by defendants, was a heavy producer of profit. Under all the circumstances, neither the law nor the truth should be strained to make it appear that the annual labor for 1897 was performed. It follows that the 8th and 9th assignments of error are well taken.

It is very plain that federal questions arise upon these assignments. The act of Congress requiring annual labor of the "worth" of one hundred dollars was so construed as to allow this requirement to be fulfilled by paying this sum for the work, irrespective of its actual value. This was error. The act of Congress requiring both parties to an adverse suit to prove their own title was construed in such a manner as to relieve the defendants of this obligation. This was also error.

IX.

Well-Defined Crevice.

By the tenth assignment of error the rulings of the trial Court in refusing instructions six and thirteen asked by plaintiff, and the rulings of the Supreme Court sustaining the same, are brought in question. We have set forth these instructions in the statement of the case, but, for convenience we will do so in this connection. They are as follows:

"6. Where the vein in controversy is a true fissure vein, it cannot be said to be discovered until the shaft shows the existence of a fissure. A vein or lode authorized to be located is a crevice or fissure in the earth's crust containing rock in place carrying gold, silver or other valuable mineral deposits named in the statutes, and a crevice is an opening or fissure in the earth's crust; and before such crevice can be considered well-defined, the opening or fissure must be so disclosed as that its existence can be established by proof at the time when the discovery is claimed.

13. The jury are instructed that the distinguishing characteristics of a fissure vein are the opening in the earth's crust in which mineral may be deposited, and the deposit of mineral itself. Where one of these features is clearly established, the other may be established by a less conclusive amount of proof. Where one wall of a vein is disclosed, and a body of mineral is found adjoining it, it may be presumed that there is somewhere another boundary or wall. But where no crevice and neither boundary of a crevice has been disclosed, the mere finding of country rock, that in one instance furnishes an assay, can not be received as sufficient proof of the existence and discovery of a fissure vein."

While these instructions were refused they were marked by the Court as having been given, in substance, in other instances. This is a mistake. No instruction was given involving any principle

asserted by either of them. Indeed the instructions given were, at every point, directly the reverse of these asked. The entire theory of defendants' case was inconsistent with these instructions. As one of the acts of location the State statute requires the

"Sinking of a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary *to show a well-defined crevice.*" (2 Mills' Stat., Sec. 3152.)

By marking these instructions as having been given, in substance, the trial Court conceded that they contained correct principles of law. The Supreme Court, however, took a different view of these instructions. It did not contend that they had been given in substance, but held that they should not have been given. It said:

"Appellant contends that certain instructions requested upon his behalf, which were to the effect that the discovery shaft upon a mining claim must show a well-defined crevice, should have been given. This contention is based upon the proposition that the vein of the discovery shaft must be plainly visible. From what we have already said, regarding the definition of 'veins,' and how their existence may be determined, it is clear that the instructions requested, which sought to inject into the case the theory that a vein could not be said to be discovered unless its boundaries were disclosed, were properly refused."

These instructions were intended to relate distinctively to the Ophir shaft. They were based upon the evidence respecting such shaft. Had they been given, the present verdict could not have been rendered without their flagrant violation. We are aware that this Court is averse to examining or weighing evidence. It will not determine

questions of fact where the evidence is conflicting. But it sometimes becomes the duty of this Court to examine the evidence in a cause. It must do it to determine whether instructions are properly given or refused. Instructions not applicable to the case, not based upon the evidence, are properly refused, even though they contain correct abstract principles of law. The purpose of these instructions was to define and require a well-defined crevice in the discovery shaft. They had no application to the Tecumseh discovery shaft or shafts 2 and 3 on the Tecumseh claim. As to these shafts there was no dispute but that they contained well-defined crevices—the only dispute being as to the contents of the crevice in the discovery shaft. But the issue as to the Ophir shaft was as to whether any crevice had been reached, at a certain depth and time.

The general issue was as to which of the parties had made *a valid discovery first*. It stood admitted that both parties made their original location without a valid discovery. Both locations were made in 1892. The Ophir location was the older by a few days, but, as it was made without a discovery, it was entirely worthless unless a discovery was made before one was made in the Tecumseh. The location of the Ophir was made upon a ten-foot shaft. This shaft was sunk to a depth of 25 feet in 1892. From 1892 to 1895 not a pick was struck upon the Ophir claim. The defendants attempted to patent the Ophir on this 25 foot shaft finished in 1892. The patent was refused, and their entry canceled because they had

not performed $500 worth of labor, and had made *no discovery*. If this decision of the Department was correct, then no discovery was made until 1895, for, as we have stated, no work was done from 1892 to 1895. The distinct point of time to which the decisions of the Department relate is October 11, 1893—the day of the hearing before the local Land Office; but the decision applies to all other days and times prior to the summer of 1895, when some further work was done.

In the spring or summer of 1895, defendants let a contract for sinking their shaft fifty-two feet. The decision of the Commissioner of the General Land Office, holding their application for a patent for cancellation, had been rendered on June 7, 1894. They proceeded with the sinking of their shaft in 1895, and, at a depth of 34 feet, they broke into a crevice which was dipping across the shaft. This crevice was about two inches thick and well-defined. It carried mineral, but not of sufficient grade to pay for working.

Now, the defendants were not content to stand upon this discovery, as of the time it was actually made, and go to the jury upon the question as to who had the first discovery. The Tecumseh discovery shaft, and shafts Nos. 2 and 3, on this claim, had been sunk in the spring of 1894. The defendants did not deny that valid discoveries were made in 1894, on the Tecumseh, in shafts 2 and 3, but they did contest the question of the sufficiency of the alleged discovery in its discovery shaft. They did not, however, have sufficient confidence in the proposition that the Tecumseh discovery shaft did

not contain a valid discovery *to stand upon it*, and, therefore, proceeded to try to inject a well-defined crevice, as required by the State statute, and a vein, as required by the act of Congress, into this 25 foot shaft, and claim a discovery dating back to 1892. In other words, they proceeded to try to show that they *discovered this vein three years, and nine feet before they got to it*. In the proper connection we will attempt to show how they *salted this shaft*, how they resorted to other *fraud and perjury*, and how they *packed a jury* which would be willing to accept the product of their fraud; but we are now simply considering the question of the legal sufficiency of the theory thus maintained. We have discussed this question, to some extent, under the headings as to what constitutes a vein, and the place of discovery. (Points 5 and 7, of this brief.)

It is said by the Court below that these instructions

"Sought to inject into the case the theory that a vein could not be said to be discovered unless the boundaries were disclosed."

The Court nowhere quotes either of these instructions, and, we submit, does not *fairly state* their contents or their theory. It would have been more satisfactory if the Court had set forth the instructions, and then stated wherein they were erroneous. But, we apprehend, this would have been a very difficult undertaking.

Instruction six declares:

"Where the vein in controversy is a true fissure vein, it can not be said to be discovered until the shaft shows the existence of a fissure."

Is this true or not? If not, why not? The same inquiry can properly be made with reference to a *well-defined crevice.* Can such a crevice be said to be discovered before its existence is shown by the shaft relied on to show it?

The instruction continues:

"A vein or lode authorized to be located is a crevice or fissure in the earth's crust containing rock in place carrying gold, silver or other valuable mineral deposits named in the statutes, and a crevice is an opening in the earth's crust; and before such crevice can be considered *well-defined*, the opening or fissure must be so disclosed as that its existence can be established by proof at the time when the discovery is claimed."

Is this correct or not? If not, we ask again, why not? Is the definition of a vein objectionable? Can there be a vein unless there is first a crevice or fissure in the earth's crust? This instruction says nothing about the size, direction, shape, location or continuity of the crevice. It declares that the crevice must be an *opening in the earth's crust.* Can there be a crevice without an opening in the earth's crust? Certainly not. There never was a vein, lode, ledge, or deposit of mineral ever discovered except in some kind of an opening in the earth's crust. The defendants claim they discovered a well-defined crevice, and a vein, within the meaning of the act of Congress, in this 25 foot shaft, in 1892. Is this true? Did they do any such thing? This instruction proposes a test. It declares that before the crevice can be considered *well-defined*, the opening or fissure must be so disclosed as that its existence can be established *by proof at the time when the discovery is claimed.*

Nothing is here said about the amount, kind or quality of proof required? Nothing is said about the vein being "*plainly visable.*" The Court below injects into this instruction expressions and meanings that can not be found in it. Nothing is said about *boundaries* being *disclosed.* All that this instruction asks is that, when the defendants claim that they had a well-defined crevice and a mineral-bearing vein, in 1892, their shaft should have made such disclosure as to have rendered it possible, by some kind of proof, to establish the fact at that time.

In 1895, at a depth of 34 feet, a vein was reached. It is from this point, and from this fact, that defendants commence to make their proof. This vein comes in on one side of the shaft and passes across it on its dip. Of course the hanging wall was first reached. No exploration has been made to see whether this vein continues on in its course up to a point within 25 feet of the surface or not. In other words the apex of this vein has never been uncovered. Here, then, is a situation that offers great temptation to, and facilities for, the manufacture of evidence. The defendants, by developments in 1895, found that in 1892, they were within nine feet of a vein. This nine feet must be bridged over in some way. They must get some witnesses to draw on their imaginations sufficiently to carry this vein, which dips sharply into and across this shaft at a depth of 34 feet, up into the 25 foot shaft as it stood in 1892.

The facility with which witnesses can be procured for such a purpose as this is well illustrated

by what the Court says in Cheeseman v. Shreeve (40 Fed., 787). It says:

"Such diverse and positively contradictory statements respecting many palpable, tangible facts, susceptible of direct proof, I have not observed in a long experience in court. Some of the witnesses, unquestionably, have not told the truth; and it is for you to conclude who they are, and whom you will believe. Judging from this trial, there must be something in the altitude of that mountain, or the depths of its mines, wonderfully prolific of falsifiers and orators. From the men of science, versed in geology, mineralogy, and mining engineering, to the most unlettered miner who dwells in the bowels of the mountain, many of them seem to be orators; and, immediately after taking the witness stand, they would be found on the platform, on the same plane as the Judge, making a speech to the jury, with all the warmth, energy, and zeal of hired advocates. Some of them were simply partizans, and seemed to have forgotten the office which the law and the obligation of their oath imposed upon them, to speak to the truth of their knowledge, and to tell nothing but the truth. Such exhibitions are to be deplored. They tend to break down the popular respect for the solemnity, dignity, and justice of judicial trials; and, where they obtain, trials are likely to become a mockery, and justice a failure."

It is quite impossible to carefully examine the testimony of some of defendant's witnesses without coming to the conclusion that, to use the language of King Edward, "*they perjured themselves like gentlemen.*"

But for the discovery of this vein in 1895, at a depth of 34 feet, not one of these witnesses could have found anything in this 25 foot shaft that would have resembled a vein any more than the pavements of Washington City do. But we will return to the instructions under consideration.

What fault can be found with instruction thirteen? It was based upon the evidence. Our theory was that any of the assays that they had made to use on the trial of this case, of rock coming from between 25 and 34 feet from the surface in this shaft was from salted ore. There was no evidence in the record that but one assay had ever been made of ore that came from this shaft prior to 1895. At the hearing before the Land Office Cone testified in regard to one assay, and he repeated that testimony upon the trial of this cause. If the jury agreed with us that their other assays were fraudulent, then there would remain but this one assay to deal with. In that view of the case we asked the Court to instruct as follows:

"But where no crevice and neither boundary of a crevice has been disclosed, the mere finding of country rock, that in one instance furnishes an assay, can not be received as sufficient proof of the existence and discovery of a fissure vein."

We submit that these instructions should have been given, and that the Supreme Court erred in sustaining the ruling rejecting them.

X.

View of Premises by the Jury.

We have a statute in Colorado which gives either party in this kind of an action, an *absolute right* to have the jury sent *to view and inspect the premises*, which statute reads as follows:

"In all suits, actions and proceedings now pending or which may hereafter be brought, in any court of this State involving the title to, the right of possession of, or the mineral contained in any mine or mining claim, *it shall be the duty of the Court* at the

trial of such suit, upon the application of either party interested therein, to send the jury empannelled in the case, *in a body*, to view and inspect the premises. Each party to the suit shall have the privilege of nominating one person, to be approved by the Court, to attend with the jury in their view and investigation of the premises in controversy, and such person or persons so selected and appointed by the Court shall be authorized to act as guide or guides to the jury, and to *point out such features* in the premises as it is *desirable* that the *jury should see*, and answer all questions propounded by the jury; but such person or persons so selected shall not be at liberty to argue or discuss any questions involved in the case either with the jury or with each other in the presence of the jury; and if such person or persons shall violate the above provision, the Court shall have the power to punish any one so offending, for contempt of court, by a fine of not more than one hundred dollars, or by imprisonment not to exceed ten days in the county jail" (Mills' Civil Code, section 188-b).

The Court, of its own suggestion, gave the jury an instruction as to its duty while viewing and inspecting the premises in controversy, which instruction is set forth in the statement of this case. The eleventh assignment of error is based upon this instruction of the trial Court and the ruling of the Supreme Court in regard thereto, and the twelfth assignment raises the question of the propriety of that part of the decision of the Supreme Court which holds that such premises *need not be viewed and inspected* by the *entire jury*. (Record, folios 772-774).

As to this statute and instruction the Supreme Court said:

"The facts upon which counsel for appellant rely in support of the claim that the jurors did not properly view the premises, are to the effect, that all the jurors did not go down the Tecumseh discovery shaft; that one of the bailiffs stated to the jurors that

those who did not care to go down the shaft of either the Ophir or Tecumseh need not do so; that two of the jurors did not view, or examine, either shaft, and that only one went down the shaft of the Ophir. In suits involving the title to the right of possession of a mining claim, it is made the duty of the Court, upon the application of either party, to send the jury in a body to view and inspect the premises in dispute Each party may select a guide to be approved by the Court, who shall be authorized to point out such features as it is desirable that the jury should see. (Paragraph 1881, Mills' Code.) In the case at bar, the jurors were not directed to examine any particular portion or feature of either claim. According to the directions of the Court on this subject, *that was left to their discretion.* We are not prepared to say that a litigant in a mining suit may not have the right to have the jury specially directed regarding the examination, but no such request was made by appellant in this case; and therefore, while it may have been proper that the jurors should each have examined the shafts upon the respective properties, the appellant having failed to request the Court to so direct, is not in a position to complain, because the jury, *in the exercise of its discretion*, only examined such features as, in its judgment, after having heard the testimony, were desirable for the purpose of aiding a better understanding and application of the evidence."

Under the statutes of England and most of our states, the granting of the view rests entirely upon the sound discretion of the Court (12 Amer. & Eng. Ency. Law, 369), and, hence, there is very little authority applicable to cases arising under our statute. By our statute the view and inspection of the premises is a matter of *absolute right.* It is made the *imperative duty* of the Court, upon the application of either party, to grant the view.

When the *right* is accorded the statute requires the Court to send the jury, *in a body, to view and inspect the premises.* The jury must go "in a body." The jury is just as much an *organized body*

while viewing and inspecting the premises as they are while sitting in the box and listening to testimony. In Brooklyn v. Patchen (8 Wend., 47), the proceeding was for the condemnation of ground for a street. The proceeding was instituted in the Common Pleas Court. The statement of the case recites:

"Whereupon the jury were sworn, and informed by the Court that such of them as wished might view the premises of Patchen, and attend the Court the next day."

The Supreme Court set aside the proceedings on the ground (and on one other ground) "that the jury when they had a view of the premises should have been attended by an officer" (2 Wend., 377). Upon writ of error to the Court of Appeals the attorneys made this contention:

"The C. P. erred in relation to the view of the premises, which should have been had by the whole panel, and not by such of the jurors only as chose to have a view; and it should have been had under the charge of the sheriff. How could the jury discreetly exercise their duty? What assurance was there that the right premises would be viewed? Besides, whether there shall be a view or not, is confided to the discretion of the Court, and not the jury" (8 Wend., 54).

The Court of Appeals affirmed the decision of the Supreme Court by a vote of 19 to 2, and the prevailing opinion, upon the point under consideration, was thus expressed:

"I think the view in this case was irregular. The Sheriff ought to have gone with the jury and *kept them together in a body*, as in ordinary cases of a view, which I think the act contemplated. Unless that was intended, the act gives them no more power in relation to a view than they could exercise without the act. I can not believe that the view given by the act was an

unmeaning thing. **Telling the jurors that those might go *who pleased* to view the premises was, I think, irregular" (8 Wend., 84).**

The Supreme Court, by Savage, C. J., said:

"It seems to me, also, that where an assessment is to be made by a jury, the parties are to have the *full benefit of this forum, as understood at common law*, and, of course, where it appears that a view was had, it should also appear that the *jury were attended* by an officer. The substance should be preserved as well as the form" (2 Wend., 377).

Of course, the Court was here speaking of a jury as an *organized body of men.*

We have now seen that the view, in a mining case, is a matter of absolute right, and that the same is to be had by the jury, in a body, who themselves are in the custody of an officer. The jury, in this case, was not only accompanied by two bailiffs, but had been ordered to be *kept together in the hands* of an officer *during the entire trial.* We now come to the question as to what were the *duties* of the jury. The statute provides that they shall be sent "to view and inspect the premises." The instruction of the Court speaks of their duty "in your view and investigation of said premises." The statute authorizes the guides "to point out such features in the premises as it is desirable that the jury should see." The instruction repeats the language of the statute. It is too plain to admit of the slightest argument that it was the duty of this jury to go, in a body, accompanied by the bailiffs, and to view such *features in the premises* as the guides *desired them to see* and should *point out.* It was the duty of the officers and the jury to follow

the guides and view and inspect such features of the premises as they should point out. This is the plain letter of the statute; the plain import of the instruction of the Court, and any attempt to evade either, by a forced construction, is a violation of both.

Now, as to whether the jury will or will not view and inspect the features in the premises that the guides desire them to see, *and which they go and actually point out*, there is no shadow of discretion vested in the jury either by the statute or the instructions of the Court. The evidence shows that the plaintiff, at his own expense, put in platforms and made both discovery shafts perfectly accessible for the view by this jury. There was not the slightest reason or excuse for any juror not viewing these shafts. It was just as much an important and vital step in the progress of this trial that the jury, *as a body*, should view these features in controversy in these shafts, as that the jury, as a body, should sit in the jury box and listen to the evidence. The guides expressed and demonstrated their desire that the jury should see into these shafts by actually taking into them all of the jury who would go. If any juror was sick so that he could not perform his duty (as to which there is no pretense) the proceeding should have been suspended until he was able to perform his duty. This view was not a mere *form*. The plaintiff, when he paid his proportion of the expenses of sending this jury and two bailiffs to view these premises, was not engaging in an idle ceremony. He was exercising a *legal right*. He had a legal right that this view should

proceed according to law. Neither the jury, nor the Court below had or has any more right to deprive him of *that right* than one man has to rob another on the public highway. The bailiff had no more authority to tell the jury that those of them who did not wish to go into these shafts need not do so, than a court has to tell a jury that those who do not wish to listen to a certain portion of the evidence in a cause may be excused for a given time.

When this scandalous outrage on the part of the bailiff was perpetrated it was not the duty of the guides to protest or enter into any dispute; to do so would have been a violation of the instructions of the Court. The result was that two of the jury did not go into either the Tecumseh or Ophir discovery shafts, and eleven of them did not go to the bottom of the Ophir shaft, where the assessment work of 1897 was claimed, by defendants, to have been done. One of the questions in controversy was whether seven or eight feet of drifting, made in a drift running from the bottom of the Ophir shaft, was *reasonably worth $100.* The guides went and pointed out this work while only one of the jury followed them to this point. We do not believe that the *proportion* of the jury who performed their duty or failed and refused so to do *is immaterial.* In one instance eleven, while in the others two, of such jury, refused to act. The one who acted in the one case, and the ten who acted in the other cases, was and were *not a jury.* The jury ceased to be a jury when it *separated.* It became a *disorganized body.* The evidence is clear and certain that neither the plaintiff nor either of

his counsel had any notice or intimation that this jury had separated and failed to perform its duty until after they had retired to consider of their verdict.

But the Supreme Court has said that the jury were not instructed to examine any *particular feature* of either claim; that this whole matter was left to their *discretion;* that the jury *exercised* a discretion, and that we can't complain because we did not ask the trial Court to specifically point out every particular feature which we desired them to view and inspect. We contest every one of these positions. Not one of them is tenable. (1) The effect of the instructions of the Court was that the jury should examine such features of the premises as the guides should *desire them to see* and *should point out*. It was the duty of the jury, under the instructions to follow the guides. (2) This left nothing to the discretion of the jury. There is no word in the instructions which expressly or impliedly vested in the jury any discretion as to what features of the premises in dispute they should view and inspect. (3) It is not true that the jury, *as a jury*, exercised any discretion. They never considered the question as to what they would view. If it could be considered that the jury, as a body, exercised a discretion, then it must be said that they determined to view and inspect these shafts, for ten of the jury actually did so. In this view of the matter the two jurors who were permitted to separate themselves from the balance of the jury, and refuse to participate in the view and inspection of the premises, not only violated the

statute and the instructions of the Court, but they disregarded the decision of the majority of the jury as to what features they would view and inspect. The suggestion of the Supreme Court that we should have asked the trial Court to direct that this jury should be *kept together* and be taken into these discovery shafts, is far fetched and *unreasonable*. We do not believe that such a thing was ever done, either at common law or under any statute. Certain it is that this would be utterly superfluous under our statute. The substantial error and wrong committed was by the *separation* of the jury. If the jury had been kept together, in a body, they would all have had to follow the guides into these shafts, because the larger portion of the jury went into them. To have prevented this irregularity, we would have had to rise in Court and move the Court to direct that the jury be *kept together*. To have done so would have been ridiculous in view of the fact that the orders of Court, and instructions given to the jury, all contemplated that they should be kept together. And if, after these instructions had been given, we had moved the Court for specific instructions that the jury should be taken into these shafts, we would, again, have made ourselves ridiculous; and the Court would have properly replied that, under the instructions, the jury would have to view and inspect all features pointed out by the guides. We therefore submit that we are in a position to justly complain of this gross misbehavior and violation of the law, and the instructions of the Court, by this bailiff, and these members of the jury, who

did not view and inspect the premises in controversy. We have a plain legal right to have this cause tried by a jury which goes, in a body, and views and inspects such features of these premises as the guides point out. We submit that this right, and the law conferring it, have both been *turned into ashes*.

This instruction contained, among others, a statement as follows:

"The Court further instructs you that the object of your visit to, and examination of, the premises in controversy herein, is to enable you to see for yourselves, and to examine for yourselves, *the physical situation, condition and surroundings of the premises.* Hence, whatever you learn by such view and examination, is available to enable you to determine the weight of the conflicting testimony of the witnesses respecting the matters upon which they have testified, and to enable you thereby the better to understand and comprehend the testimony of the witnesses respecting the issues involved herein concerning said premises, and your verdict must be based upon the evidence before the Court, thus the more intelligently applied by you from your view and examination of said premises."

This instruction contemplates that the jury will use what they see and learn on their view of the premises merely as an aid to apply the evidence, while the better opinion seems to be that they may treat what they see as evidence (Railroad Co. v. Ditch Co., 11 Colo. App., 41; Cleveland C. C. & St. Louis Ry. Co. v. Case, 71 Ill. App., 459; Wellington Waterworks v. Brown, 6 Kan. App., 725; St. Louis & C. R. Co. v. Postal Tel. Co., 173 Ill., 518.) If this is the correct view, then it is all the more important that *all* of the jury should view such parts

of the premises as constitute the vital matters upon which the cause must be determined.

The Court below refused to consider the instructions given to the jury respecting their view of the premises, on the ground that there was some part of such instructions which were not erroneous, and that our objections and exceptions, entered at the time the instructions were given, did not sift out the good from the bad. This ruling is directly contrary to the latest decisions of that Court. (Ritchey v. People, 23 Colo., 314; Mining & Milling Co. v. Prentice, 25 Colo., 4).

The instructions given in this case were very lengthy. It is altogether impracticable, after a Court has prepared and read its charge to the jury, to stop the proceedings and scan the charge in such a way as to be able to distinctly point out all the erroneous propositions that may be scattered through it. No such thing has ever been required before and we trust that it never will be again.

The instructions in this case were separately numbered. The instruction to the jury as to their view of the premises was given, as one instruction, following the general charge of the Court. The instruction was chiefly in regard to their conduct and proceedings. But the Court undertook to declare what weight they should give to what they learned by their own observation of the premises. This was about the only legal proposition contained in the instruction. We think that under the former decisions of the Colorado Supreme Court, the exception was entirely sufficient.

Heretofore the law and practice in Colorado has been that if the charge of the Court was a single instruction, relating to one general subject, a single exception was sufficient. If the charge related to a number of subjects, and was divided up accordingly, and the different paragraphs numbered, it was sufficient to except to these paragraphs by numbers; or if the objection went to all of the paragraphs, an exception to each and every of the instructio s was sufficient. A new and ***unwise distinction*** has now for the first time been introduced, to the effect that if any one of the instructions can be divided up into two or more propositions, although all these propositions *relate to one general subject*, a general exception is insufficient if there is any correct proposition contained therein. The rule ought to be just the reverse. An exception to such an instruction should be considered an exception to each and every proposition contained therein; and, if any one proposition is erroneous, then the instruction should be pronounced erroneous. Of course, we are contending for this rule only as it relates to an instruction, all of the propositions of which relate to one general subject, and is given as a single instruction or properly numbered. The instruction we are considering relates to the duties of the jury while viewing the premises and the manner in which they shall apply knowledge thus obtained.

XI.

Special Venire and Packed Jury.

The thirteenth and fourteenth assignments of error are as follows:

"13. The said Supreme Court erred in holding that the venire was properly ordered by the Court below; in sustaining the court below in not granting a new trial because of irregularity in ordering said special venire and in not reversing the judgment because of such irregularity.

14. The said Supreme Court erred in holding that said special venire was not made use of by the sheriff to pack a jury in said cause, and in not reversing said judgment by reason of this fact."

In regard to these subjects the Supreme Court said:

"The District Court of El Paso County is conducted under two divisions, in one of which civil causes are tried, and in the other, criminal. It is the custom to assign certain jurors of the regular panel to each division. When this cause was called for trial, appellees demanded a jury of twelve. The number of jurors in attendance on the division in which the case was pending not being sufficient from which to select that number, the Court, instead of calling jurors from the criminal division, directed a certain number to be summoned by open venire. From the persons thus summoned, and those of the regular panel in attendance on the division in which this cause was tried, the jury was selected. After verdict, objection to the action of the Court in summoning talesmen was made for the first time, when it was sought to show that the jurors in attendance on the criminal division were not employed or needed when the jury in this case was impanneled. Appellant is not in a position to raise any question regarding the action of the Court in directing the issuance of an open venire. The exercise of reasonable diligence upon his part would have disclosed the apportionment of the jurors between the two divisions of the Court, and if the conditions were such that he could have properly insisted on having jurors called from the division engaged in the trial of criminal causes, who were then not actually

upon any jury, before talesmen could be placed in the box, it was his duty to call the attention of the Court to this fact. Having failed to do so, any error in this respect is waived. It is not necessary, however, to place the decision of this question upon this ground alone. The apportionment of the regular panel between the two divisions of the court was entirely in the control of the judges; their action in this respect can not be interfered with; they make the apportionment in view of the expected need of jurors in the different divisions; if it turns out that they were mistaken in their action, it will not be inquired into for the purpose of ascertaining whether a proper apportionment was made or not. It was evident that a jury of twelve could not be selected from the regular panel attending the division in which this cause was tried; the judge directed an open venire for a sufficient number for this purpose. This, in the exercise of his discretion as to how and when talesmen may be summoned, he had the clear right to do. (2609, 3 Mills; Laws '91, section 4, p. 250.)

It is claimed that the sheriff packed the jury in this case, in the interest of appellees. This charge is based, substantially, upon these facts: It appears that the sheriff, or his office, received notice that a special venire for jurors would be issued; from what source this information was obtained is not disclosed; that persons, part of whom held commissions as deputies, were requested by the sheriff or his official employés, to be at the sheriff's office on the morning the venire issued, but prior to its issuance, who were afterwards summoned as talesmen, and called into the jury-box. One of these deputies, not selected as a juror, was afterwards detailed as the bailiff, specially in charge of the jury in this case. There is not a word of evidence that the sheriff or any one connected with his office, or that either of the persons summoned as talesmen, were biased against the appellant, or took any steps, directly or indirectly, to influence the jurors selected to try this cause. In our opinion, there is not the slightest reason to impugn the integrity of the sheriff, or those acting under him, in this matter."

The statutes bearing upon this subject are as follows:

"For the purpose of selecting jurors to serve in courts of record, the several counties in the State of Colorado shall be divided into four classes: Counties having ten thousand or more voters shall constitute the first class. Counties having three thousand, and not exceeding ten thousand voters, shall constitute the second class. Counties having one thousand, and not exceeding three thousand voters, shall constitute the third class. Counties having less than one thousand voters shall constitute the fourth class. The board of county commissioners in each county in this State, sixty days or more before the time appointed for holding a District Court in such county, shall select from the inhabitants of such county having the qualifications prescribed by law, and not exempt from jury duty, competent persons to serve as jurors in number and manner following, that is to say: In counties of the first class, there shall be selected eight hundred names. In counties of the second class, three hundred names. In counties of the third class, two hundred names. In counties of the fourth class, one hundred names. The county treasurers of the respective counties shall, at the request of the board of county commissioners, deliver to said board, free of charge, in alphabetical order, a list of male inhabitants of their county who pay taxes, and the board of commissioners shall select names of jurors from residents of said county, so far as practicable from such list, but shall have the right to add thereto the names of persons qualified for jury duty under the laws of this State until the full complement of names are selected; which names when so selected shall be immediately certified by the clerk of the board of commissioners to the clerk of the District Court of said county; or if such county shall be attached to another for judicial purposes, then in the manner hereinafter specified: *Provided*, That the board of county commissioners in each county so attached shall be required to select only one-half the number of names specified in the above classification" (Laws 1891, page 248, section 1).

"The clerk of the District Court shall write the names certified to him as aforesaid on ballots, one name on each ballot, and place such ballots in one compartment of the said box. At least thirty days prior to the term of court, and afterward as often as

the Court shall order, the clerk of the District Court shall call to his assistance the Sheriff of the county, and in the presence of the Sheriff draw by chance from the compartment of the said box in which the names have been placed, a sufficient number of grand and petit jurors for the next term of the District Court of such county. When so drawn the ballots shall be placed in the other compartment of the said box. In case a jury is required in the County Court, to try either civil or criminal cases, the Judge of the County Court shall so notify the clerk of the District Court in writing, stating in such notice the number of jurors desired, whereupon the clerk of the District Court shall call to his assistance the sheriff, and shall draw from the box the requisite number of jurors, and shall certify their names to the clerk of the County Court, who shall then issue a venire to the sheriff to summon the jurors so drawn, and make it returnable, as the said County Court may order, which Court shall, so far as possible, fix the trials of jury cases for some definite time, and shall try them successively by the same panel of jurors, so far as is practicable, and when the trials are over he shall discharge such jury from further attendance. Talesmen may be secured in the County Court in the same way as they are in the District Court. After said jurors are drawn and their names certified to the clerk of the County Court as provided in this section, all laws, proceedings and practice applicable to jurors in District Courts, shall apply to jurors in County Courts" (*Id.*, page 249, Sec. 2).

If at any time the number of ballots in the box, shall be reduced to fifty or less, in counties of the first class, and to twenty-five or less in counties of the second, third or fourth class, the Judge of the District Court may, in his discretion, direct the clerk of said Court to certify such fact to the clerk of the board of county commissioners, whereupon it shall be the duty of said clerk to immediately notify each of the county commissioners, and the said commissioners shall forthwith meet, and proceed to select such a number of jurors, as may be designated in the order of the said district Judge, and the clerk of said board shall immediately certify to the clerk of said District Court, the names of such jurors so drawn; and the clerk of the District Court shall place such names in the box ready to be used as occasion may require.

Whenever it shall be necessary to bring in a new panel of jurors, the Court shall direct that they be drawn from said box. *Whenever it shall be necessary to summon talesmen*, the Court, in its discretion, shall direct that they be drawn from said box, or summoned from the bystanders, *provided* that either party may show cause, why talesmen should not be summoned from the bystanders, *or may issue an open venire as heretofore prac iced*, and, in every case, the *venire facias* shall be returnable as the Court shall direct, *provided* it shall be ground for challenge to any person so summoned from the bystanders on an open venire, if he shall have served as a juror either in a regular panel or as a talesman in any Court of record within one year then last past." (*Id.*, page 250, section 4.)

"If the board of county commissioners shall fail to return a list of competent persons, or if jurors shall not be drawn and summoned as herein provided, and a jury is required in either the District or County Court, the Court shall, nevertheless have power to cause a jury to be summoned by open venire as heretofore practiced. In case any board of commissioners shall willfully neglect or refuse to furnish a list of jurors, as in this act provided, each member of the board of commissioners so failing, refusing or neglecting, shall be individually subject to a fine of not more than five hundred dollars, to be recovered in an action in the name of the people for the use of said county. Such action to be brought and prosecuted by the district attorney of the district in which said county is situated, and the money, when collected, shall be paid in the county treasury for the use and benefit of the general county expenses, and a neglect or failure to select jurors, as in this act provided, shall be *prima facie* evidence that such neglect or failure was willful unless excused by sickness." (*Id.*, page 251, section 5.)

The record recites as follows:

"Thereupon the defendants demand a jury of twelve men which is granted. And thereupon comes a jury. * * * Thereupon on motion of said defendants, the plaintiff thereto consenting, it is ordered that the jury in this case *be kept together* and in the charge of a bailiff during the recesses and adjourn-

ments of this Court, while the trial of this cause is in progress" (record, folios 21, 22).

A certificate of the clerk of the Court in which this cause was tried sets forth:

"There are *no orders of Court transferring any portion of the jurors on the regular panel* from division two to division one of said Court prior to February 9, 1898" (record, folio 679).

A duly certified list of the regular panel of jurors in attendance on the Court on February 9, 1898—the day the trial opened—shows that there were fifty-three jurors, of such pannel, in attendance (record, folio 681).

In this condition of the regular panel, the Court, when a jury of twelve men were called for by defendants, issued a *special venire* for ten jurors. The return upon that writ shows that Mangold, Cree and Bowers were the three first men to be summoned (record, folios 682, 683).

The record then recites as follows:

"GEN. JOHNSON: There is one thing I would like to show by the deputy in the other division, that is, unless it will be admitted—that there was but one jury called for in that Court in the forenoon of that day; he informed me of that.

MR. THOMAS: I will admit that, but object to its materiality" (record, folio 684).

Bowers testified that he had been the sheriff of El Paso County; that he held a commission as deputy sheriff under the present sheriff, but had performed no actual service; that he was notified that he was wanted as a juror at his residence, 724 North Nevada; that he was notified to be at Court at half-past nine o'clock; that Court opened in the

civil division at 9:30, and in the criminal division at 10 o'clock; that when he was not called in the civil division the sheriff made him doorkeeper in the criminal division (record, folios 654, 655), and that later he was appointed bailiff to take charge of the jury in this case (record, folio 659).

The testimony of W. L. Cook shows that Bowers, Mangold and Cree held commissions as deputy sheriffs (record, folio 665). Other testimony shows that Bowers preceded Boynton in the sheriff's office, and Mangold was his under sheriff (record, folio 645). Mr. Cook also testified that these three deputy sheriffs were all summoned in the sheriff's office, and that Bowers had been specially sent for to his house, and had come down before he was summoned.

On the hearing of the motion for a new trial, Mr. Mangold being upon the witness-stand, proceedings occurred as follows:

"During the time you were a deputy sheriff you attended the Court here a good deal, did you not?

Defendants object, being immaterial and incompetent; which objection was by the Court sustained; to which ruling of the Court the plaintiff, by his counsel, then and there duly excepted.

Plaintiff offers to show by the witness that during the years he was a deputy sheriff he was in attendance upon the Court more or less; that he frequently saw Mr. C. S. Thomas attending this Court and knew him at least by sight; that notwithstanding this fact he testified on his *voir dire* examination to the effect that he knew none of the attorneys even by sight, except Mr. Early.

Which offer of proof was by the Court excluded; to which ruling of the Court, plaintiff then and there duly excepted" (record, folio 646).

The plaintiff below (who is plaintiff in error here), together with his attorneys, made an affidavit as follows:

"That the facts and circumstances alleged in the motion for a new trial, now on file in said cause, and which are set forth in the affidavits filed in support of the same, and which will be relied upon in oral testimony adduced in support of said motion, did not come to our notice or knowledge until after the jury had been charged and retired to consider of their verdict" (record, folio 674).

There was uncontradicted and unexplained evidence showing that Mangold, after he went on this jury, was practically a free character, and was permitted to separate from the jury, and did so repeatedly. While at the premises, the jury, although they had been ordered to be kept together, and two deputy sheriffs had been appointed for that purpose, or some other purpose, the jury were permitted to divide into three parties. Two of the jury did not go into either shaft. Ten of the jury went into both shafts. When Bowers took ten of the jury down to the 34-foot point in the Ophir shaft, he left nine of them and went, *with only one juror*, to the bottom of the shaft to examine the *all-important point* where the annual labor was claimed to have been done in 1897. What a terrible pity that we did not have a few more deputy sheriffs there to keep the jury together!

On the law and facts stated, and, perhaps, other facts not fully stated, but which may be adverted to later, three questions arise. (1) Was this a lawful jury? (2) If not, did we waive the

unlawful procedure? (3) Was this *special venire* made use of to pack this jury?

Was This a Lawful Jury?

In Dupont v. McAdow (6 Mont., 226; 9 Pac., 925), the Court, in construing statutes similar to ours, said:

"It is the right of a party to have a full panel from which to select a jury for the trial of his cause. It is his right to have this panel selected by the commissioners from the tax-payers of the county, and not until it is ascertained that a jury can not be obtained from the panel thus provided can a *special venire* rightfully issue. If the full panel of 24 becomes depleted by reason of sickness or other cause during the term, it is the duty of the Court to cause the same to be filled from the 100 names selected by the commissioners. The panel being full, and having become exhausted by reason of challenges for cause, or peremptory challenges, during the formation of a jury for the trial of any particular cause, then, and not until then, may an *open venire* issue to complete the jury for that cause. The issuing a special *venire* in a particular cause raises no presumption that the 100 names selected by the commissioners have become exhausted. If a *special venire* is issued before the regular panel of 24 has become exhausted in the formation of a jury for any particular cause, or if a party is required to select a jury for such cause from a panel of less than 24 regular jurors, or if, the regular panel not being full, resort is had to an open special *venire* to complete the jury for the pending trial, then the jury so formed is not such a jury as a party is entitled to, or that is *authorized by law*. It is not every 12 men that can be found that form a *lawful jury*. They must be men selected from the proper place, and drawn and summoned according to law. A requisite number of persons having the qualifications of jurors will not constitute a jury, or panel of jurors, unless they are drawn and summoned as jurors in conformity with the law. (Lincoln v. Stowell, 73 Ill., 246.) A panel of jurors not drawn according to law *is a nullity*. (Clinton v. Englebrecht, 13 Wall., 441.)

It is the right of a party at the commencement of a trial to have a *full panel* of 24 jurors from which to select a trial jury. (Kennon v. Gilmer, 2 Mont., 450; 2 Pac., 21.) It was error, therefore, to have compelled the defendant and appellant to select a jury from a panel of less than 24 *regular jurors*, and it was error to have issued an open *venire* to complete a jury partly formed from a panel of less than 24 jurors."

This quotation contains sound law. It emanates from a western court, but it is highly worthy of having been spoken by any Court in *Christendom*. If we could read something emanating from this Colorado Court, in vindication of the integrity of our system of trial by jury, as grand, elevating and ennobling as this, how gloriously it would inspire confidence and pride in the institutions of that State.

The jury law of 1891 (Laws 1891, p. 248), furnishes no shadow of authority, justification or excuse for a court, composed of two divisions, to make such a disposition of the regular panel as will, *ipso facto*, deprive every litigant of the right of a trial by a jury of such regular panel. This act inaugurates nothing new. It provides that a Court

"May issue an open venire as heretofore practiced." (Sec. 4.)

This may be done where the Board of County Commissioners has failed to furnish the list for a regular panel, or such regular panel, has not been drawn and summoned (Sec. 5) or

"Whenever it shall be necessary to summon talesmen." (Sec. 4.)

It may be that a Court composed of more than one division has a certain measure of discre-

tion as to the appointment of jurors to the different divisions, but this discretion can not be exercised so as to arbitrarily deprive a litigant in any division of the Court of a lawful jury. Not less than 20 jurors, of the regular panel, can furnish the basis of a lawful jury. This number gives a jury of twelve with 4 challenges on each side.

The act of 1874 (Laws 1874, p. 174) provided:

"Whenever it shall be necessary to summon talesmen, the Court may direct that they be summoned from the bystanders, or may issue an open *venire*, as heretofore practiced." (2 Mills', Sec. 2609.)

The act of 1877 defined the circumstances under which talesmen might be summoned for the purpose of making up a jury, and that was where, and only where,

"The panel of petit jurors in attendance upon the Court shall be *exhausted* before such jury shall be filled."

This act contemplates two things. (1) That there is a *panel* to start with. (2) That such panel becomes *exhausted* before the jury is filled. A panel consists of enough jurors to try a cause often deducting the number of prematory challenges allowed by law. When and only when this panel becomes exhausted by challenges for cause the *special venire* may issue. This legislative intent is made plain by a provision of the code, which reads:

"For a trial of a civil action by jury, the jurors shall be drawn by chance from the *whole number summoned and in attendance, except those who may be engaged in considering any other cause*." (Mills' Ann. Code, Sec. 179.)

The record demonstrates that the whole number of jurors summoned and in attendance when this cause was called for trial, and not engaged in the trial of any other cause, was fifty-three. The addition of a judge to a Court does not nullify this statute. Where there is more than one judge they must manage the jurors in accordance with the statutes. They cannot, by any apportionment of jurors, deprive litigants of their right to a trial by a lawful jury. A man has precisely the same right to have a trial in Arapahoe County where we have five judges, by a jury drawn according to law, as he would have in a county where there is but one judge. If this were not so, we would have one system of law in one county and another system in another county; and this would be in violation of the Constitution. (*Ex parte* White, 5 Colo., 521.) This provision of the code is plain and unambiguous. There are but two factors to consider (1) The number of jurors summoned and in attendance. (2) Those engaged in considering another cause. This statute applies to a court that has two judges as well as one that has but one. But even if it should be conceded that the jurors may be divided between the two or more judges of a court, this certainly can not be done in such a way as to disable any judge from furnishing, out of the jurors summoned and in attendance, the necessary number of jurors, of the regular panel, to make up a full jury after deducting the peremptory challenges. In Stratton v. People (5 Colo., 276, 280), the Court said:

"After the regular panel has been exhausted, the Court may order a tales (General Laws, sections 812, 1479), but the prisoner has the right to object to the *depletion* of the panel on *insufficient grounds.* * * When the irregular action of the Court compels a resort to talesmen this right is impaired."

The same principle was announced in Morney v. People (7 Colo., 218, 220). A party to a civil suit has the same right to a trial by a jury organized according to law, that a prisoner in a criminal cause has. In neither case can a special venire issue until the regular panel has become exhausted; and such exhaustion of the regular panel must have occurred in a regular and lawful manner. The custom of arbitrarily and finally apportioning the entire panel, with the exception of sixteen, to the criminal division, which we shall see was secretly inaugurated, was an unlawful custom. No statute authorized it. The necessary effect of it was to violate the statutes of the State. It deprived litigants of rights plainly secured by such statutes. It gave the opportunity to *pack a jury* in this case. It inaugurated the one man power—the certain precurser of corruption. It furnished a victim for fraud and crime. The victim was no sooner furnished than the ghouls and buzzards appeared on the scene.

As to why and how this regular panel was frittered away, and the sheriff furnished an opportunity to pack this jury, we will let the *trial Court* be heard. That Court, in overruling our motion for a new new trial, gave a long written opinion, which, we submit, appears like a plea in self defense. It says:

"The first ground is that the Court erred in calling a special venire until the regular panel was exhausted. It has been the custom in this court to summon jurors at the beginning of the term sufficient in number to perform their duty in both divisions. The venire is made returnable into the first division, and thereupon they are apportioned between the two divisions. Such procedure was adopted at the present term, and the number of jurors serving in *the civil division, where this trial occurred, was, I think, sixteen.* The parties to this action calling for a jury of twelve, the panel in attendance was insufficient, and it became necessary for that reason to summon a *special venire*, which was done by the Court without objection whatever on the part of plaintiff. The contention now raised is that, it appearing that there were a greater number of jurors in attendance upon the Court, regularly summoned, although *in use and apportioned* to the criminal division, they should have been called ere a *special venire* was ordered. It might be a sufficient answer to this allegation of error, that no objection was made at the time, for it is undoubtedly the law that unless any irregularity in the summoning of a jury is met by objection at the time, it is waived. I quote: 'A *known or obvious irregularity* in the process of empanneling must be objected to at the time it is committed; it will not do to make the objection for the first time on a motion for a new trial, or in arrest of judgment.' (1 Thomp. on Trials, Sec. 113 and cases cited.) This seems to be a reasonable and just rule, otherwise the complaining party is given the opportunity to accept the verdict of the jury, if for him, and if not, then to raise the objection at a later period. *Holding the objection up his sleeve to use if he is beaten*, and making no objection whatever if the irregularity is for his benefit; but waiving that point, *there is nothing to show that there were any jurors in the criminal division not necessary for the transaction of business there. It does not appear upon this motion that the total number of jurors apportioned to the criminal division were not performing duty or considering cases at the time.* I think under the jury act of 1891, Sec. 4, that the Court possesses the power whenever it is necessary to use additional jurors, to summon them ere the original panel is exhausted in anticipation of a de-

ficiency, and this especially would be true if the jurors on the regular panel were called into the box ere those on the special venire; and it appears from the testimony of C. R. Manning, Deputy District Clerk, that this was done in the case at bar. It is true that the names of some of the special venire preceded the names of some of the regular panel, but this could very easily occur in placing the names upon the list furnished counsel, and is no evidence that the regular panel were not first called, as was sworn to by the clerk. In the case of Nesbit v. The People, 19 Colo., 464, the Court says: 'It is in the discretion of the Court to cause talesmen to be summoned by drawing them from the certified list, or from the bystanders, or by open venire, as heretofore practiced; and such mode of summoning talesmen may be resorted to whenever the regular panel of jurors has become insufficient from any cause as well as when such panel becomes exhausted in selecting a jury for the trial of a particular cause. * * * No prejudice can result to any party by summoning talesmen in advance, provided they are not actually called into the box to the exclusion of the jurors composing the regular panel. It does not appear that any juror of the original panel was thus excluded in this case. It would be a most serious inconvenience if the Court were obliged to resort to a drawing from the certified list in order to complete a jury for the trial of a particular cause, or to supply a deficiency in the regular panel; and the language of the statute does not require such construction' (Housh v. People, 50 Pac., 1036, on the same point; U. S. v. Langherty, 13 Blatch. (U. S.), 267; State v. Allen, 47 Conn., 121, Thomp. on Trials, Secs. 20, 25, 26).

So this ground I do not regard as tenable."

We regard the above statement by the Hon. Ira C. Harris as one of the most extraordinary pieces of literature that can be found in the annals of jurisprudence. If he was arraigned for perverting justice it would strongly tend to convict him. Every person is presumed to intend the reasonable and probable consequences of his act. The probable, and almost certain consequences, of

giving a sheriff power to pack a jury in every important civil case, by the use of a *special venire*, is to tempt him to do it. The conduct of a person arraigned—such as flight from justice or giving false accounts of himself—often furnishes strong incriminating circumstances. Let us see how the above statement harmonizes with the record facts of this cause.

There were fifty-three jurors in attendance when the case was called. They constituted the regular panel. Sixteen had been reserved for the civil division of the Court, which left thirty-seven for the criminal divison. Let it be borne in mind that these divisions are not two courts. One is not a criminal and the other a civil court. It was one court with two judges (People v. District Court, 14 Colo., 396). The entire subject of courts composed of more than one judge is regulated by an act approved April 2, 1887 (Laws Colo., 1887, page 260). This act is set forth in the statement. By the seventh section of this act it is provided that jurors may be summoned and empanneled, for *each of the judges sitting separately* as though each was the sole court. It may be that this provision of the statute is not mandatory. It may be perfectly legal to summon jurors for the Court generally, and empanel them in any division; but, where this is done, they must be held subject to duty in any of the divisions. If the bulk of the jury can be appointed to one division *all of the jurors* may be disposed of in like manner. The universal custom in Arapahoe County, where we have four divisions of the Court for civil business, is to have a body

of jurors, sufficient for the business of the Court, all of whom are subject to be called into any division of the Court, when not in actual use elsewhere.

The county of El Paso, where this case was tried, was, at the time of the trial, next in importance in the State, in point of legal business, to Arapahoe County. At that time Cripple Creek, Victor and other important mining towns, now situate in Teller County, were in El Paso County. The property in controversy is in the Cripple Creek district.

In Colorado, a lawful jury is composed of six men, but either party can demand a jury of twelve. (Mills' Ann. Code, Sec. 197). In empanneling jurors for use in the two divisions of this Court, and in secretly apportioning them (for there was no record made of this apportionment), why, in the name of justice we ask, why did these judges only reserve sixteen jurors for the civil division of the Court, and thus make it necessary (assuming that this apportionment precluded calling into the civil division jurors apportioned to the criminal division) to issue a *special venire* in every case in which a jury of twelve was called for? Judge Harris quibbles and evades, in his opinion quoted above, but he does not answer this question. He says that the thirty-seven jurors that were at the other end of the hall of the house in which these two courts were held were "*in use* and apportioned to the criminal division." If he means that these thirty-seven jurors were in *actual service*, then he mistates the record. When this cause was called and this *special venire* was issued, not one of

those thirty-seven jurors was in service. This civil division met at 9:30; the *special venire* was issued; the sheriff had his ten men on hand; he had drummed them up before the special venire had been issued; everything worked like clockwork; this jury was completed, and, when Bowers, who had been summoned on this *special venire*, was not called to serve on the jury, and was appointed door-keeper in the other division of the Court, went to that division, they were engaged in empanneling a jury to try a petty criminal. It must have been a petty case, for they tried it in the forenoon and another in the afternoon. These facts are shown by the testimony of Bowers himself.

It stands admitted that but one jury was *called for* in the criminal Court in the forenoon of that day. (Record, folio 684.) Judge Harris says that it does not appear that any of these thirty-seven jurors "*were not performing duty or considering causes at the time.*" Is this the truth according to this record? The first jury empanneled, in either division of the Court, on February 9, 1898, was the jury that tried this cause. What is a fair construction of the admission of counsel upon the subject of these jurors! Language must be construed in the light of the circumstances under which it was used. The object was to show that none of the jurors assigned to the criminal division were on duty, in the forenoon of that day, except the jury called in the morning, and even these jurors were called after our jury had been completed. What do the words "called for" reasonably mean? They mean that in the forenoon of that day the criminal divis-

ion of the Court was not using but one jury. If there was a jury out *considering a case* it would be *called for* in that division just as much as though it was *engaged in the trial* of a cause. If another jury had been out considering a case the records would show it, and Judge Harris would have known it, and stated the fact.

But after the Court had issued this *special venire* it did not proceed to call the sixteen on the regular panel before these *special veniremen* were called. It stands admitted that the Court issued the *special venire before any juror was called* (record, folio 668). Judge Harris is in error as to the testimony of his clerk. He testified that he arranged his list of jurors to be used by counsel in making their challenges, in the order in which they were called (record, folio 668). A duly certified copy of this list is found in the record (folio 28½ on page 15). A comparison of this list with the return on the *special venire* (record, folio 682) will show that it contains seven of these special veniremen; that we exhausted our four challenges on these specials, and had to accept three of them on the jury. Of these specials Mangold was fifth and Cree twelfth on the list. This shows that the specials were called and crowded upon the list before even the sixteen of the regular panel had been called.

But the Supreme Court, without noticing any of these excuses of Judge Harris, based upon misconceptions of the record, proceeds to declare that this custom of making such an apportionment of the regular panel as to deprive every litigant of a

trial by twelve jurors of such panel, is perfectly valid and will not be inquired into by an appellate court. We submit that this is *judicial nullification* of the laws of Colorado. It is *not construction.*

We ask this Court to read and consider the act of the General Assembly of Colorado (Session Laws 1891, page 248). This statute provides that sixty days or more before the time appointed for holding a District Court, the board of county commissioners in each county shall select from the inhabitants of such county having the qualifications prescribed by law and not exempt from jury duty, competent persons to serve as jurors. In the county of El Paso, which is a county of the second class, the number to be thus selected would be 300 names. The names so selected must be immediately certified by the clerk of the board of commissioners to the clerk of the District Court of such county. (Session Laws of Colorado, 1891, page 248, section 1.) It then becomes the duty of the clerk of the District Court to write these names on ballots, one name on each ballot, and place such ballots in a box, and at least thirty days prior to the term of court such clerk must call to his assistance the sheriff of the county and in the presence of the sheriff draw by chance from such box a sufficient number of petit jurors for the next term of the District Court of such county. (*Id.*, page 249, section 2.) The statute further provides that whenever it shall be necessary, the Court in its discretion may issue an open venire as heretofore practiced. (*Id.*, page 251, section 4.) It also further provides that if the board of county commis-

sioners shall fail to return a list of competent persons, or if jurors shall not be drawn and summoned as herein provided, and a jury is required in the District Court, the Court shall have power to cause a jury to be summoned by open venire as heretofore practiced. (*Id.*, page 251, section 5.) This last cited section of the statute, however, makes it an offense for each member of the board of county commissioners to willfully neglect or refuse to furnish such list of jurors punishable by a fine of not more than $500, to be recovered in an action in the name of the people for the use of the county, and declares that a neglect or failure to select the list of jurors shall be *prima facie* evidence that such neglect or failure was willful, unless excused by sickness. The only occasions under this act of 1891 on which a court has any power to issue a special venire is when the board has failed to certify a list of jurors from which a regular panel may be chosen, or when it becomes necessary by reason of the exhaustion of the regular panel. Neither of these conditions existed. It is apparent that the pretended necessity for a special venire in this case existed, if it existed at all, by reason of the improvident and unlawful management, upon the part of the Court, of the regular panel of jurors provided by law. It is well settled that, under statutes such as have been referred to, a litigant has an absolute right to a trial by jurors upon the regular panel unless such panel has been properly exhausted. (Dupont v. McAdow, 6 Mont., 226; Daniels v. Brisged, 73 Tex., 149; Lincoln v. Stowell, 73 Ill., 246.)

Have We Waived This Illegality?

If this "custom" was legal then there was nothing to waive; we had no right to a jury of the regular panel. An objection would have been utterly unavailing. Judge Harris treats and defends this "custom" as an *absolute and final* disposition of the regular panel. The Supreme Court *sustains this view*. There is no intimation that the trial Court ever did or ever would recall any of these jurors to the civil division who had been apportioned to the criminal division. What were the facts?

The plaintiff in error and his attorneys reside in Denver. They went to Colorado Springs to try this cause. By an uncontradicted affidavit they show that none of the facts and circumstances, relative to any question raised by motion for a new trial, *came to their notice or knowledge until after the jury had been charged and retired to consider of their verdict* (record, folio 674). What does Judge Harris say upon this subject? He ignores and suppresses this affidavit, but, in effect, says that we *knew the facts* and *held them up our sleeve*. We are not familiar with those situations where things are held up the sleeve. Upon this point we bow, with due deference, to Judge Harris. Certain it is, however, that if he means to assert that we knew the condition of his court, with reference to jurors, he is altogether mistaken and has no record fact to sustain him. Were we bound to know these facts? It is only a *known or obvious irregularity* (according to the authority cited by Judge Harris), that is waived if not objected to at the time. We had a right to presume that the trial

Court was doing business in a lawful manner. We had the right to presume, in the absence of notice or knowledge to the contrary, that, at the time this special venire was issued, the Court knew of some necessity for the act, of which we were ignorant. We had the right to presume that the regular panel of jurors had been depleted in some lawful manner, and to such an extent as to make this a necessity. This unlawful "custom" was so far from anything that was legal, or within the spirit of our laws, or the genius of our institutions, as to excuse any one from suspecting the existence thereof. To have suspected that Judge Harris, to use his own expression, held a *special venire* up his sleeve in every case where a jury of twelve was called for, would have been unnatural and unjust. If we had suspected foul play, and had gone to the record, we would have discovered nothing about this unlawful custom. As the action of the Court in disposing of the regular panel so that we could not have a trial by twelve jurors, of such panel, was unknown to us at the time the *special venire* was issued, there was no waiver by not objecting at the time (16 Amer. & Eng. Ency. of Law, p. 626).

Was This Jury Packed?

The plaintiff and his counsel when they went to Colorado Springs to try this cause fell among a band of thieves as dangerous and as infamous as ever cut a throat or scuttled a ship. The trial was very largely a farce, and that portion of it which was not a farce was a crime. To sustain this position we point to the record facts of the case.

Before we reached the place of trial the right of trial by jury had been stricken down. When this cause was called for trial there were fifty-three jurors on the regular panel in the court house, not one of whom was on duty and every one of whom could have been called upon, if necessary, to serve in this case. We are not now charging that the Court which adopted the *infamous custom* by which the sheriff was furnished an opportunity to pack a jury in every important cause, acted corruptly; but we do believe that such a custom was brought about by, and for the benefit of, a ring of corrupt politicians occupying and controlling the sheriff's office during successive administrations of that office. We therefore use the fact of this custom, in this connection, for the sole purpose of showing that an *opportunity* was unlawfully furnished the sheriff to commit a crime. Did he embrace the opportunity?

We will point out a few of the facts and circumstances tending to show that he did.

1. Before the *special venire* was issued; before the Court met on the day this cause was set for trial, and, of course, before the defendants had called for a jury of twelve men (the very thing that made a *special venire* possible) he was *drumming up* his *personal favorites* to serve on this jury.

2. Of the ten men thus selected three of them were M. F. Bowers, F. A. Mangold and A. Cree, all of whom held commissions as deputy sheriffs. Bowers had preceded the sheriff in his office, and Mangold had been Bowers' under sheriff.

3. When Bowers was not kept on the jury he was first appointed doorkeeper of the other division of the Court, and then promoted to the position of bailiff having charge of this jury, and later, made a regular deputy.

4. That Mangold testified falsely to the end that he might be kept on the jury.

5. Mangold was frequently permitted to separate from the balance of the jury, and be sometimes alone, and, at other times with Bowers, but never with the other bailiff.

6. While at the premises to make an examination the jurors were given every opportunity to communicate with any one desiring to improperly influence them, the bailiff making no effort to keep them together, but on the contrary, actually suggesting and authorizing their separation.

7. The verdict itself is a *monstrous absurdity*, and is supported by no evidence upon several important points.

We will notice these facts and circumstances with a little further detail. In speaking of them, the Supreme Court says:

"It is claimed that the sheriff packed the jury in this case, in the interest of appellees. This charge is based substantially upon these facts: It appears that the sheriff, or his office, received notice that a special venire for jurors would be issued; from what source this information was obtained is not disclosed; that persons, part of whom hold commissions as deputies, were requested by the sheriff, or his official employés, to be at the sheriff's office on the morning the venire issued, but prior to its issuance, who were afterwards summoned as talesmen, and called into the jury box One of these deputies, not selected as a juror,

was afterwards detailed as the bailiff, specially in charge of the jury in this case."

Only a part of these circumstances are alluded to, and those which are mentioned are grouped together in such a way as to impair or destroy their *probative force.* The Court says that the sheriff received notice that a special venire would be issued, but from what source this information came is not disclosed. What difference does it make that the source of this information was not expressly disclosed? *It could have come but from one source.* Who knew that the defendants would call for a jury of twelve men? It was a matter within their own breast. In the very nature of the case we could know nothing about it, and our affidavits show the fact. Who, then, disclosed the fact to the sheriff that the defendants would call for a jury of twelve, and this demand would be followed by the issuance of a *special venire?* It must have been some one connected with the defendants' side of the case, and some one who could speak with authority, for otherwise the sheriff would not have *acted upon it.* But why did the sheriff commence *official action* before he had *official authority?* Why did he commence *corralling jurors* before Court met; before a jury of twelve had been demanded, and before the Court had determined to issue a *special venire?* How could he know that the Court would not call in some of the thirty-seven jurors, of the regular panel, who were then in attendance on the other division of the Court, not one of whom was in actual service at the time this case was

called? These are all questions to be duly considered in determining the *weight* to be given to the fact that this sheriff was proceeding to summon jurors before he had any official authority so to do. We submit that the proceeding was irregular, unusual and highly suspicious. But let us see what follows.

After *prematurely starting* in to drum up jurymen how does he proceed? Is it a usual thing to send off to the private residence of the ex-sheriff of the county, who may be presumed to be a prominent citizen, if not a prominent politician, to ask him to come down to serve on a jury? Ordinarily citizens try to *evade jury duty*. It was not, then, an act of *pure, disinterested* friendship. He sent for him because he wanted to *use him*. He was a secret deputy, and he knew he could give him a *tip* as to how he wanted the case to go. *But the Supreme Court says we don't prove the tip.* Who would know about that except the *guilty parties?* And is it expected that they will tell it? If the Courts wait for that kind of direct evidence the administration of justice in Colorado will be rotten with corruption, and no one ever detected.

But the sheriff has now got Bowers for a juryman. If he was packing a jury, we would naturally expect that he would furnish Bowers with a *working mate*. It would not be quite safe to trust alone to him. While one prominent man on a jury, who is corrupted in the start, can generally control the same, it is safer to have more. In selecting a man to work with Bowers, the sheriff would naturally select some one who could be easily approached

by him. And now, behold! Mangold, the under sheriff when Bowers was sheriff, is the next person to be selected. Then Cree was selected. These are the three men whose names appear first upon the return to the *special venire* (record, folio 682). These men all held *secret commissions as deputy sheriffs*.

But what next? Bowers was not kept on the jury, while Mangold was. This would never do. *The combination was broken.* Bowers must have some connection with this jury. The sheriff, therefore, holds him in reserve, by appointing him doorkeeper in the other division, until he can get him in direct communication with the jury by getting him appointed as a bailiff in charge of the jury. Up to this time Bowers, though holding a secret commission as deputy, had never performed any active service. From and after the trial of this cause he remained, in active service, as a deputy sheriff. So that if the plaintiff in error, and those associated with him, who have in good faith, made shafts and drifts on the Tecumseh mine aggregating about twelve hundred feet, at an expense of more than ten thousand dollars, shall finally lose this property, they have left the consolation that they, through the trial of this cause, *furnished Bowers a job.*

On the hearing of the motion for a new trial, the following question was propounded to Mangold:

"During the time you were a deputy sheriff, you attended the Court here a good deal, did you not?"

Objection was sustained. Plaintiff then made the following offer:

"Plaintiff offers to show by the witness that during the years he was a deputy sheriff he was in attendance upon the Court more or less; that he frequently saw Mr. C. S. Thomas attending this Court, and knew him, at least, by sight; that, notwithstanding this fact, he testified on his *voir dire* examination to the effect that he knew none of the attorneys, even by sight, except Mr. Early," which offer of proof was denied. (Record, folio 646.)

This witness was not a juror when he gave this false teslimony. He prevaricated for the obvious purpose of being kept on the jury.

Assuming now that there was a conspiracy to be executed, it is certain, in advance, that Bowers and Mangold will need to communicate. In case there was to be but an *ordinary separation* of one juror from his fellows there would be but one chance in twelve that it would be Mangold, but if there is a conspiracy then it *must* be Mangold, and it was Mangold. He pretends that he was sick, but this pretense is a fraud. He was never sick in business hours. But we find him separated from the balance of the jury at other times very frequently, some times *entirely alone*, with suspicious characters near enough to communicate with him. But the other side will say that generally, when he was separated from his fellows, he was with bailiff Bowers, and it was, therefore, *all right;* but, surely, they will intend this for a joke. When we refer to these suspicious separations as a circumstance, taken with all the other circumstances, tending to show that this jury was fradulently packed and corruptly controled, the Supreme Court disposes

of the matter as a mere question of *separation*. Let us group these facts together, by way of recapitulation, and take a more general view of them.

Why was the sheriff sending to the residence of men and notifying them to come to his office to serve on a special venire before any such venire had been issued, and before proceedings in Court had been taken, rendering its issuance probable or possible? How did he happen to summon these three deputy sheriffs on a venire of ten men? How did two of these deputies happen to be a former sheriff and under-sheriff who immediately preceded him in office? Why did one of these deputies testify falsely on the *voir dire* in order to be kept on this jury? Why was the former sheriff made a special bailiff so that he and his former under-sheriff could be associated in connection with this jury—one as a juror, and the other as a bailiff? How did it happen that Mangold (and he only) was continually separating himself from the other jurors and being seen alone, or in company with a stranger, or in company with Bowers; but never in company with the other bailiff? Why did the bailiff, in direct violation of the order of the Court to keep this jury together, and the instructions of the Court to take the jury in a body to view such features of the premises as should be pointed out by the guides, announce to the jury that any of them who did not wish to view and inspect the premises need not do so? Can this Court answer all these questions, and reconcile all of these irregularities and make them consistent with any theory that they all occurred accidentally and with-

out any design? We respectfully submit that it was the duty of the Court below to have done this before saying that there is not the slightest reason to impugn the integrity of the sheriff or any one acting under him.

The Court below says that it is not shown from what source the sheriff derived information and notice that a *special venire* would be issued; but what are the probabilities of the matter. It must have come from someone who knew that Mr. Thomas would call for a jury of twelve. Who knew that fact except Mr. Thomas or someone associated with him? The sheriff would not be likely to be arranging to fill a special venire upon any vague supposition of his own that it was possible that such a venire might be issued. In weighing circumstantial evidence the reasoning faculty should be employed; and when we commence to reason upon the subject we find that there is evidence to show that the sheriff derived information from Mr. Thomas, or someone associated with him that a special venire would be issued. If this is true then why was such information imparted to the sheriff? Will the Court be pleased to tell us? Was this information communicated to the sheriff for any sinister purpose? We believe it was. If not, why has it not been explained? If there is nothing to conceal about this transaction, why did the defendants on the hearing of our motion for a new trial, fail to explain how the sheriff obtained this information; why it was imparted to him, and for what reason he was selecting his men to serve on a special venire before any order had been issued

for him to summon one? We were making the attack upon the sheriff and would not be expected to call him for the purpose of incriminating him by his own testimony. When we showed a very suspicious irregularity, the burden of explaining the same rested upon them; and their failure to do so intensifies the grounds of suspicion. It follows, then, that we have made out a fair *prima facie case* to the effect that this information was communicated to the sheriff by someone on the other side of the cause and for some *secret and sinister purpose.*

The next fact that we desire to point to is that the first step taken by the sheriff after getting such information was *unusual and irregular.* When a person does a thing out of the usual course of business, we naturally seek for a *motive!* What motive actuated the deputy sheriff in sending off to the private residence of ex-Sheriff Bowers and notifying him to come down to the sheriff's office by 9:30 to serve on a jury? His act demonstrates that for some *special reason* he wanted Mr. Bowers on that jury. What was that reason? He was not looking for *any good men,* for he could have found plenty of them within a stone's throw of the Court house. He was looking for *particular men.* How did it happen that Cree and Mangold, two other deputy sheriffs, were in the sheriff's office just in time to be summoned on this jury? How did it happen that out of ten men summoned on this special *venire* three of them were deputy sheriffs? We answer, unhesitatingly, that it was the work of *design* and not *chance.* If that design was lawful

and proper why has it not been explained? How did it happen that, when Bowers was not accepted as a juror, he was immediately appointed a doorkeep, and, later on, a special bailiff to take charge of this jury? He had never before performed any active service as a deputy sheriff. We declare it to be our firm conviction that all these facts and circumstances fairly and reasonably show that there was a studied and persistent design on the part of the sheriff that Bowers should have something to do with this jury. If so, then there was some *adequate motive* behind that design. We can think of no adequate motive for such a design other than a desire to influence the verdict of the jury. *Can this Court do so?* What motive did Mangold have for denying, under oath, that he knew Mr. Thomas even by sight? He had been an under-sheriff where Mr. Thomas had been practicing regularly for years and knew him well. Clearly he wanted to be kept on the jury, but why? Was it merely for the *per diem* that a juror is paid? No, a man will not take a false oath for that. It is more reasonable to suppose that he knew that the sheriff had a special desire that he and those other deputies should serve on this jury, and concluded that he would forward that purpose. The fact that we cannot follow this man into the jury room and show his conduct there makes it all the more the duty of this Court to scan every circumstance that has been otherwise shown tending to show that a foul crime was committed by the "fixing" of this jury.

We now have Bowers as a bailiff and Mangold as a juror—the former sheriff and his under sheriff —associated together in connection with this jury. We have seen the irregular proceedings, and strange coincidents by which they are brought together. We have shown facts which give rise to a reasonable inference that the sheriff had a desire and intent to influence this jury, and that these deputies were the instrumentalities to be used for that purpose. If this was true then occasions would in all probability arise when it would be desirable for these two men to communicate. From all that had gone before it would be very probable that Bowers would seek to separate Mangold from the balance of the jury to the end that he might communicate with him in regard to the purpose for which they had been brought together. Accordingly we find that, on a good many different occasions, Mangold was separated from the balance of the jury. Two witnesses positively swore that they saw him alone in a room with a stranger to them standing in the door, and this is neither disputed nor explained. On several other occasions he was alone with Bowers. Here, then, everything happens to meet all the requirements and exigencies of a conspiracy. The necessary opportunity was created by which these men, so strangely brought together, could co-operate to any common end. All of these undisputed facts, when taken and considered together, create a *strong probability* that Bowers and Mangold were brought together to influence this jury, and that they executed this purpose. In view of all these suspicious circumstances

we do not see how any court can *conscientiously sustain this verdict.* The consequences of a mistake are not equal. If an error should be committed by granting a new trial on this point, the defendants would merely have to try this case over. If they are entitled to this property the presumption is another jury would say so. The parties, by a new trial, would only be placed on an equality, for we won this case once, and the defendants took a new trial as of right, a thing which we could not do. But on the other hand, if a mistake is committed against us, one of the most *infamous crimes is gilded over*, and these scoundrels are only encouraged, by their escape, to go on with their robberies through the forms of the pretended administration of justice; and we are finally and forever *deprived of our property by the crime.*

XII.

Misconduct of Guide.

The fifteenth assignment of error relates to a transaction about which the record recites as follows:

"After the jury had returned into open Court, from its view and investigation of the premises in controversy herein, General Johnson, counsel for plaintiff, said:

I am advised that Mr. Smith, guide for the defendants, before the jury reached the property, had made a measurement and survey as to the southwest corner of the claim where it would by right be and had driven a stake there to indicate the point, and it varies from our understanding of where the corner ought to be; it varies from our certificates of location, so that it seems to me that that is not evidence—that he had no right to do that.

THE COURT: I don't think that was evidence at all.

GEN. JOHNSON: I think that ought to be excluded from the consideration of the jury.

MR. THOMAS: I will say, for the information of both Court and counsel, that while I know nothing about the act of Mr. Smith upon the ground, I fully expected that he would be here upon Monday morning. My instructions to him when he left town were to go up there and run these lines and come back on Monday morning. Upon telephoning on Monday night, we found that he was not here, because he understood that there would be no trial on Monday, on account of the fact that that day was motion day, but expected to be here on Tuesday morning, when it was too late for us to introduce any testimony. If he made a survey or set a post, it was doubtless under the instructions that were given to him for the purpose of using him as a witness. Of course he was not used as a witness on account of this misunderstanding, but I fully agree that if any post was set there by him upon any measurement which was not testified to before the jury and which was the subject of cross-examination, it may go out.

THE COURT: Yes, I think that is true; he had no authority to do that.

MR. THOMAS: My object in making this explanation is to disabuse the mind of the Court and counsel of the idea that after he was appointed as a guide, he went there for the purpose; I think he must have done this on Saturday or Sunday.

GEN. JOHNSON: We don't question that.

THE COURT: I will simply say to the jury in that connection, that any information which may have been received through the medium of Mr. Smith in relation to the point where corner stake No. 4, that was the witness stake of the Tecumseh, was placed, other than that which you have received during the presentation of evidence in this court room, and upon the trial, will be disregarded entirely by you.

MR. THOMAS: Unless the lines were run at the request of the jury, but I don't suppose that was done."

As to this transaction, the Supreme Court said:

"While the jury was engaged in viewing the disputed premises, the guide selected by the appellees pointed out to the jurors the place where, he claimed, the southwest corner stake of the Tecumseh would fall, by right. It seems that he had previously made a survey of the premises. This action on the part of the guide was wrong, and directly contrary to the instructions of the Court; but the attention of the Court was called to this matter previous to argument, whereupon the jury was directed to disregard what was said by the guide regarding the proper place for this stake, and told that upon this point nothing could be considered except the evidence introduced in the court room and upon the trial. This declaration of the trial Judge was right, clear and emphatic, and we *cannot assume that men who had taken a solemn oath to obey the instructions of the Court would disregard this plain, authoritative statement regarding their duty.*"

But can a Court assume (with any certainty that it is correct) that the jury *could a d did* wholly free itself from the influence of the act of Smith? He was not only one of the principal expert witnesses for defendants, but was the guide appointed by the Court to represent defendants upon the view, by the jury, of the premises. The evidence in the case made it clear and certain that this corner fell by right upon this railroad embankment, but as to the exact point on this embankment, and as to the relation which said corner would sustain to the railroad track, there was considerable uncertainty upon the evidence. No other stake had ever been driven at the point claimed. The testimony was of a general character. The jury made no survey and made no measurements, that we have any account of, to

satisfy themselves precisely where that corner would be. It is a pure matter of speculation and guesswork as to whether what Smith showed them and told them about this corner, and what they saw in regard to this stake, did not have more or less influence upon their minds throughout their consideration of the case. The consideration by the jury of matters outside of the evidence is ground for a new trial. (Proff. Jur. Tr., Secs. 392 and 393.)

The mere fact that the Court directed the jury not to consider what they had learned from Smith, gives no *positive assurance* that the jury did not, consciously or unconsciously, allow it to influence them.

In Tourtellotte v. Brown (4 Colo. App., 377), the Court said:

"The evidence having been taken in a different proceeding, with different parties, although pertaining to the same note, was clearly inadmissible, as much so as if taken in a matter entirely foreign to the controversy. Its admission was error, which was not cured by the attempted withdrawal. Counsel can not put immaterial, incompeteut and improper testimony before a jury, allow it to remain there to the close of the trial, and cure it by a formal withdrawal, which, if heard by the jury, might utterly fail of comprehension, and having been impressed upon the minds of the jurors, have had all the effect it could have had if competent. Such practice can not be too severely criticised. In support of these propositions: *Erben* v. *Lorillard*, 19 N. Y., 299; *Furst* v. *R. R Co.*, 72 N. Y., 547; *Peck* v. *Yorks*, 47 Barb., 131; *Scripps* v. *Reilly*, 35 Mich., 371.

In the former case the Court said, by Grover, J.: 'The plaintiff's counsel insists that this (if error) was cured by the charge. When illegal evidence, properly excepted to, has been received during a trial, it must be shown that the verdict was not

affected by it, or the judgment will be reversed. *If the evidence may have affected the verdict, the error can not be disregarded. The rights of parties can only be preserved by adhering to this rule.* It would be vain to observe the rules prescribed by law to secure an impartial jury, if their minds are to be subjected to the influence of illegal evidence after they are empanneled. *It does not follow that impressions thus obtained will have no effect, although the judge directs them to diregard the evidence.*"

In Furst v. *R. R. Co., supra*, such an error was the only one considered, and the judgment was reversed."

Where improper matter has been brought before a jury, the person objecting to it does not have to show affirmatively that he was *actually injured thereby*. Error of this kind *presupposes* injury. In Mining Company v. Broderick (26 Colo., 16), the Court said:

"That the error committed is reversible, seems also well settled by the authorities. In a case involving the same principle, this Court in *D. S. P. & P. R. R. Co.* v. *Wilson*, 12 Colo., 20, used this language: 'It is impossible to say that the admission of this testimony was error without prejudice; it may have been the very thing that induced the jury to find negligence on the part of the defendant.' The rule upon this question has been laid down by the Supreme Court of the United States in numerous cases which we approve, as the one to be followed in this jurisdiction. In *Deery* v. *Cray*, 5 Wall., 795, in answer to the argument that a judgment should not be reversed when the error complained of works no injury, Mr. Justice Miller, speaking for the Court, says: 'But whenever the application of this rule is sought, it must *appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.*' Expressly reaffirming these announcements of the rule are *Smiths* v. *Shoemaker*, 17 Wall., 650; *Gilmer* v. *Higley*, 110 U. S., 47; *Vicksburg & Meridian R. R.* v. *O'Brien*, 119 U. S., 99, where this phraseology is employed: 'It is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of *did not and could not have prejudiced the rights of the party.*' Also Mexia v.

Olliver, 148 U. S., 644, and Boston & Albany R. R. v. O'Reilly, 158 U. S., 334."

As to whether plaintiff was prejudiced by this act of Smith no court can do any more than to make a *guess*. The administration of justice should not be governed by any rule of *chance*. It should be governed by stable and unbending principles. No person should be deprived of his property by any rule of law or procedure which is not to be generally enforced. The error complained of relates to one of the vital points in the case. If the jury found that the southwest corner of the Tecumseh claim by right fell upon one of the slopes of the railroad embankment, and not between the rails so as to interfere with the passage of trains, then, by the eighteenth instruction *we were instructed out of court*, even though the jury may have believed that such slope was *precipitous ground*. Our witnesses had not been able to say positively whether the stake, by right, would have fallen between the rails or on one of the slopes. We were maintaining that the whole structure was *precipitous ground* within the meaning of the statute. In this condition of the case Smith made a survey, drove a stake, and informed the jury where, in his opinion, the corner fell. The jury may have used that information to, in some way, form an opinion which they could not eradicate from their minds. They may have formed such an opinion partly on what Smith said, and partly on their own observation, based upon what he said, and the exclusion of Smith's information would not have affected their *general conclusion;* and yet it might all be wrong.

Smith may have committed error in his survey, and, based upon that survey the jury may have made erroneous observations, and the verdict might have been entirely predicated upon these errors. Of course, if the jury found that this corner was illegal we had *no standing in court*. In regard to such a vital point courts should not enter the realm of speculation as to whether matter unlawfully placed before a jury did or did not have some *prejudicial influence*.

The Court below, upon this very point, relied again on the chapter of chance. The Court *guesses* that the jury treated a part of instruction seventeen, and instructions eighteen and nineteen as *one instruction*, and were governed by the language found in *nineteen* rather than by that found *in eighteen*. But who knows any such thing? What certainty is there that this *guess* is correct?

It makes no difference whether instructions eighteen and nineteen are considered as one instruction or as two instructions. In either event there were two distinct and inconsistent propositions of law enunciated. They could not be reconciled. One or the other had to be followed and the other rejected. Which did the jury follow? Could the Court below, or can this Court, tell? Is it safe or right that the property rights of plaintiff in error shall depend upon a *guess?* We declare it to be, in our judgment, a suggestion far removed from the beaten path of the orderly administration of justice that a court shall guess that the jury was not prejudiced by the act of Smith, and should then further guess that instruction nineteen, rather

than eighteen, was followed by the jury. The latter guess presupposes that the jury had keener discernment than the Court which gave these *conflicting* instructions, and was able to follow the rule of the right, and reject that of the wrong one.

XIII.

Separation of Jury.

The sixteenth assignment of error is based upon that part of the opinion of the Court below holding that the various separations of the jury while hearing the case, and after the submission of the same, as shown by the evidence, did not constitute a ground for a new trial. That Court said:

"The misconduct of the jury is based upon the fact that one of the jurors, after the cause was submitted, was separated from his fellows. An affidavit of this juror and the bailiff fully explains the reason of one separation, but it is insisted that this is not the one established by affidavits filed in support of this ground of the motion for a new trial. According to one of these affidavits, the juror was in a room by himself, and during that period some unknown person was standing in the door of this room, who, upon seeing the affiant, turned and walked away. Much stress is laid upon the fact that during these separations the juror was seen alone in company with the bailiff, who had originally been summoned as a talesman. The mere separation of a jury, after the submission of a cause, is not *per se* sufficient for setting aside the verdict and granting a new trial. It must appear that, by reason of such separation, there is a strong probability that the jury has been tampered with, or improperly influenced to return the verdict which is sought to be set aside. (*Dozenback* v. *Raymer*, 13 Colo., 451.) There is nothing in the facts established by the affidavits that the jury or any member had been tampered with, or that any effort was made in this direction. Citizens who are required to render services in the determination of disputes between

litigants, should not be charged with a disregard of their duty or their oath, nor will the Courts assume that they have been guilty of such conduct, unless the facts upon which such a charge is based warrant that conclusion."

In this statement and disposition of this question, the Court ignores many of the facts and circumstances which tend to show that these separations were the result of conspiracy. The relations of this juror with the bailiff are not alluded to. The very names and positions of the accused parties are suppressed.

We introduced some testimony that can not justly be ignored or suppressed. Mr. John W. Carr, of Victor, Colorado, is a prominent and reputable citizen. No attack upon him appears in this record. In an affidavit made by him, he says that he

"is acquainted with F. A. Mangold, one of the jurors who sat in this case during the trial of the same, which began, to wit, February 9, 1898; that after the evidence had been presented, arguments made by counsel, jury instructed by the Court, and the case submitted and given to the jury to decide, and during the deliberations of the jury in attempting to arrive at their verdict in said case, F. A. Mangold was absent from the remaining jurors in said case for a period of at least twenty minutes; * * * that during the time said Mangold was absent from the jury and at the time that Mangold was in the room by himself, a person unknown and a stranger to affiant stood in the Tejon street door of the room in which said Mangold was in and remained there a few minutes until he noticed affiant, when he immediately left and walked rapidly north from the Alamo Hotel on Tejon street" (record, folios 670, 671).

The same facts are fully set forth in an affidavit made by Henry Kelly (record, folio 675).

These are evidently not the occasions of the separation referred to in the affidavits of Mangold and Bowers. The Court below sees nothing suspicious in any of these separations, either those described in the affidavits and evidence for plaintiff or those admitted in the affidavits made for defendants. Of course, the Court sees nothing suspicious about any feature of the case. But we do. Let us recapitulate some of the facts—undisputed facts. On this memorable morning of February 9, 1898, Mr. Cook, the under-sheriff, sends for Mr. Bowers, a former sheriff of the county, to serve on this jury. At the time this was done, no venire had been issued or ordered. At about the same time, Mr. Mangold, the former under-sheriff of Mr. Bowers, very conveniently appears in the sheriff's office, and is summoned on this jury. When Bowers was not placed on the jury, he was given another position about the court house, and is subsequently placed over this jury as a special bailiff. Mangold stays on the jury. Here the former sheriff and under-sheriff of El Paso County are placed in a position where they can co-operate. The trial goes on for about ten days, and little is noticed except that occasionally Mangold, Hull, and perhaps one or two others are seen coming into the court house a few minutes after the balance of the jury have come in, alone with this Bailiff Bowers. Nothing is heard during these ten days of any illness on the part of Mangold. The jury retires to consider of their verdict. It is found that the jury are divided in opinion. This is shown by the fact that they were out about 24 hours. If Mr. Bowers

was interesting himself in the nature of this verdict, it would be necessary for him to communicate with some of the jurors to ascertain how the jury stood, and cast about for means to bring about the desired result. This opportunity was made by the extremely convenient illness of Mr. Mangold. No doctor is brought forward to show that this illness was real and genuine For ourselves we believe it to have been a fake and a fraud. It was a pretense, and a necessary pretense, to enable this former sheriff and his under-sheriff to communicate with each other. The trial Court seems to have placed stress on the fact that during some of these separations he was in charge of Bailiff Bowers. That is a matter to consider under ordinary circumstances. But in the light of the manner in which Bailiff Bowers became Bailiff Bowers, we think it would have been better for Mr. Mangold to have been alone in the company of any other living man than Mr. Bowers. The separation of the jury by reason of illness must be by authority of the Court (Civil Code, Sec. 189). The several separations disclosed by the evidence in this case are clearly ground for a new trial (Dozenback v. Raymer, 13 Colo., 451; Monon v. Commissioners, 21 Kan., 448; Robinson v. Donahoo, 25 S. E., 491; Pracht v. Whitridge, 25 Pac., 192; Thomp. Jur., Sec. 330; 12 Am. & Eng. Enc. Law, page 375).

In Dozenback v. Raymer (13 Colo., 451), the separation was by order of the Court, and allowed before the jury had entered upon the consideration of the cause. Our Code provides:

"After hearing the charge, the jury may either decide in Court or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the Court. The officer shall to the utmost of his ability keep the jury together, separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the Court," etc. (Civil Code, section 90).

The affidavits of J. W. Carr and Henry Kelly show a plain violation of this statute. These affidavits show that during the deliberations of the jury, after their retirement, Mangold was absent from the balance of the jury, and in a room by himself, for a period of *twenty minutes*, and that while he was in this room by himself, a man unknown to them, stood in the door of such room, and *remained there a few minutes until he noticed affiants*, when he *immediately left and walked rapidly away*.

Mangold and Bowers give an account, in their affidavits, of a separation where Mangold was locked in a room with one of the bailiffs. On the occasion referred to by Carr and Kelly the door was open; Mangold was in the room alone; no bailiff was with him, and a stranger stood in the door for some minutes, who, when he discovered that he was noticed, walked rapidly away.

As the evidence upon this point is solely by affidavit this Court can weigh it as well as the Court below could. It should be weighed in connection with, and in the light of, all the other evidence bearing upon the manner in which Mangold and Bowers were placed upon, or in connection

with this jury. Here is a man who is a deputy sheriff; he prevaricates on the *voir dire* examination, in order to be kept on the jury; he is found alone in a room for twenty minutes while the balance of the jury were engaged in their deliberations; a stranger stands in the open door, who, when he finds himself observed walks rapidly away. No man would be likely to be standing in an open door of a room occupied by another, for several minutes, without holding some communication with him. If this man had any legitimate business with Mangold he would have been likely to have gone in the room and transacted it. His actions were suspicious. He stands in the door so that, in the event of being seen he can get away without detection. As soon as he discovers that he has been observed he walks rapidly away. If the affidavit of Mangold can be construed as denying that there was any such separation as Carr and Kelly describe, then there is a question of *veracity* raised, and upon that Carr and Kelly are arrayed against him (Mangold).

We believe the better rule to be that a separation, after retirement, unless for some absolutely necessary purpose, will vitiate a verdict. In 12 Amer. & Eng. Ency. Law, page 375, the author says:

"Separation is not allowed, in any case, after the jury retire to find their verdict, until it is found and delivered in open Court."

Numerous authorities can be arrayed to sustain this exact proposition, that such separation is fatal to a verdict. But we do not have to go so far

as this. The authorities which stop short of this all agree that if there is any further irregularity or any reasonable grounds of suspicion that the separation was prejudicial to the losing party the verdict must be set aside. In Dozenback v. Raymer (13 Colo., 451), this Court said:

> "It is true that, if the separation of the jury was attended with *reasonable suspicion of abuse*, a new trial would be granted."

We submit that the separation testified to by Carr and Kelly was attended with circumstances giving rise to reasonable suspicion of abuse. The same may be said with reference to the separation at the mine. It was a most *remarkable proceeding* for a bailiff having charge of a jury under a general order to keep them together, and instructions to take them, in a body, to view premises, to tell them they might separate. What were these two jurors doing all the time the ten were examining these shafts? We do not know. We had no right to have anyone there but our guide, and he went below. A long line of strong decisions hold that a separation

> "subjects the successful party to the necessity of proving that no prejudice to the other side resulted therefrom" (12 Amer. & Eng. Ency. Law, p. 375).

The separation at the mine certainly did result in two of the jurors not seeing any of the important features of the premises, and in eleven of them not going down to the point in the Ophir shaft and viewing the annual labor of 1897. This was a separation before retirement, but, when the jury is under an order to be kept together, the

same rule would apply as though they had retired. Can this Court say that these separations were all *free from reasonable suspicion of abuse*, or that it fairly appears that we were not *prejudiced* thereby?

XIV.

Newly Discovered Evidence.

The seventeenth assignment of error is based upon the ruling of the lower Court as follows:

"The newly discovered evidence upon which appellant bases his right to a new trial, was evidence, so it is claimed, which would have impeached the credibility of one of the important witnesses of the appellees. It does not appear that if this witness had been impeached, it would have changed the result. There were other witnesses testifying to the same matters he did. Newly discovered evidence which only goes to impeach the credit or character of a witness, is not sufficient ground for a new trial, *except it is clear that such impeachment would have resulted in a different verdict.* (*Christ* v. *People*, 3 Colo., 394.)"

It appears that on Febreuary 2, 1898, the Secretary of the Interior rendered a decision by which he concurred in a recommendation made by the Commissioner of the General Land Office that the commission of James F. Smith as a deputy United States mineral surveyor be revoked, and directing such commissioner to take such proceedings in the premises as were necessary to that end (record, folios 676, 677). This action was taken because of false affidavits which Mr. Smith had made and filed in the Department of the Interior. On February 11, 1898, the Commissioner carried this decision of the Secretary into effect by directing the Surveyor General to give Mr. Smith notice of the revocation

of his commission (record, folio 677). These proceedings were going on at the very time the trial of this cause was taking place. James F. Smith was the first, and, we think, the most important witness introduced by defendants. His testimony covers about twenty-four printed pages of this record. He was also the guide appointed, at the instance of defendants, to accompany the jury while viewing the premises, and the man who made the survey, drove the stake and pointed out to the jury the true place where the southwest corner of the Tecumseh claim would fall. We can not but believe that his testimony was very influential and possibly controlling in the estimation of the jury. He testified as a man *holding a responsible office* under the Government of the United States. This certainly gave his testimony *strength and credit*. The evidence, however, shows that when he was giving his testimony he had been *deposed from this office* for making *false affidavits*, though, perhaps, he had not received notice of his removal at the time he was testifying. According to the affidavit of plaintiff and his counsel, they had no notice or knowledge of the removal from office, or of the true character of Smith, until after this trial was over; and it is apparent that no ordinary diligence that could have been exercised by them would have discovered the fact. We are aware that the general rule is, that newly discovered evidence going only to the impeachment of witnesses is not ground for a new trial. But there are exceptions to this rule. (Christ v. People, 3 Colo., 396.)

Our statute (2 Mills, Sec. 4822,) contemplates that a person convicted of crime is competent to testify as a witness, but such conviction may be shown for the purpose of affecting his credibility, and this may be shown "as impeaching testimony or by any other competent testimony." In this instance, the conviction was not only for crime, but for the crime that throws the *highest discredit upon the testimony of a witness.* It would, at common law, have absolutely disqualified him for testifying. The rule against granting a new trial on newly discovered impeaching testimony, in its reason and logic, applies more particularly to such testimony *as goes to general reputation and to contradictory statements.* But where the newly discovered evidence shows a conviction of an important witness for an offense which shows that he has no regard for an oath, the rule ought not and does not apply. While the testimony in some views may be impeaching in its nature, it reaches beyond that and goes to the actual status and qualifications of the witness. Under the statute he may testify, but he must do it under a cloud that affects his actual standing as a witness. Where this damaging fact is unknown at the time of the trial, or occurs about the time of the trial in which the witness testified, and this fact, if known to the jury, might have affected his testimony to such an extent as to have produced a different result, a new trial should be granted. It is not necessary that the Court should be able to determine that it would or should have produced a different result. The Courts are not called upon to weigh conflicting

evidence for the purpose of making this determination. It is sufficient that newly discovered evidence makes it *probable* that it might alter the verdict. (Linscott v. The Orient Ins. Co., 88 Me., 497; Freeman v. Hutchison, 43 N. E., 16.)

XV.

Samples of Rock.

The eighteenth assignment of error is based upon a ruling of the Supreme Court as follows:

"On the trial below appellees offered in evidence samples of rock purporting to come from the discovery shaft of the Tecumseh, which they claimed did not contain mineral. In rebuttal, appellant produced a sample claimed to have been taken from a crevice in this shaft. This evidence was excluded on the ground that it was not rebuttal. 'Rebuttal evidence is defined to be that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side.' (19 Am. & Eng. Ency. Law, 1093.) Appellant had offered evidence in chief tending to prove the existence of mineral in the discovery shaft of the Tecumseh. To meet this evidence appellees had introduced samples from this shaft. As against this evidence, the offer of appellant was not rebuttal. It was nothing more or less than evidence which would have tended to prove the existence of a vein in the Tecumseh shaft, and would properly have been admissible in chief, but it was in no sense rebuttal, *for it did not tend to prove that the samples received in evidence on behalf of appellees were, in fact, mineral-bearing or did not come from the Tecumseh.*"

In regard to the offer of these samples the record recites as follows:

"Q. Have you got any samples of rock with you that you took out of the Tecumseh crevice? A. I have.

Q. Will you produce it.

Defendant objects; which objection was by the Court sustained; to which ruling of the Court plaintiff then and there duly excepted.

GEN. JOHNSON: I present herewith a piece of rock, which I ask the stenographer to mark as an exhibit in the case (Exhibit 6) and offer to prove that it came out of one of the crevices in the Tecumseh shaft, and that it is mineral-bearing rock, and I offer this in rebuttal of the testimony of Mr. Moore and to contrast the same with the two samples of rock which he produced, and which were introduced in evidence in defense, and ask that these samples be also marked by the stenographer as exhibits in the case.

Defendants object because not rebuttal; which objection was by the Court sustained, to which ruling of the Court the plaintiff then and there duly excepted." (Record, folios 597, 598.)

The propriety of the ruling of the trial Court excluding this evidence was raised by the seventeenth assignment of error in the Supreme Court. This ruling was sustained by a general clause of the *original opinion* of the latter Court, and the above quotation is taken from the opinion on petition of rehearing.

The testimony of Mr. Moore that this offered and rejected testimony was intended to rebut was as follows:

"Q. Did you break any pieces of rock from any portion of the Tecumseh shaft which you have with you? A. No, sir.

Q. Did you assist in breaking any? A. I assisted Mr. Darby, I think, a little, taking the rock out.

Q. Have you them with you. A. I have.

Q. Please produce the pieces that were taken from the Ophir shaft? A. From the Tecumseh shaft.

Q. I mean the Tecumseh shaft, and indicate as nearly as you can upon the section plan where they came from and what they are? A. Those two samples marked A and B it is a fair average of the general rock shown in the Tecumseh shaft and

came from the lowest portion of the shaft between A and B opposite this drift at the bottom.

Q. What is that rock? A. That rock is the ordinary porphyry; technically it is called breccia.

Q. Ordinary country porphyry? A. The country porphyry of the district.

Q. How near to either of the fractures or seams mentioned was that specimen taken from? A. It was taken about half way between seams A and C.

Q. About midway between them? A. There was one piece came from the south side of the shaft close to seam C; I might make it a little clearer by giving the exact spot. It came from between these two or three small seams close together; it was right in between those marked on the south side of the drift pretty close to the shaft; that is sample marked A." (Record, folios 395 and 396.)

The Supreme Court says that our sample was not rebuttal evidence because it did not tend to prove that the samples received in evidence on behalf of appellees were, in fact, mineral-bearing, or did not come from the Tecumseh. This view is clearly erroneous. (1) If our sample was mineral-bearing and came from one of the crevices of the Tecumseh discovery shaft, it would have *some direct tendency* to show either that defendant's samples did not come from the same shaft, or, if they did, that they were mineral-bearing, although defendant's witness claimed they were not. (2) But the Court *creates and substitutes a purely false issue* for the real issue. The pleadings form no issue as to whether these samples of rock were taken from the Tecumseh shaft, or were mineral-bearing or not. The issue was broader than this. The issue was as to whether there was a well-defined crevice in the Tecumseh discovery shaft bearing mineral

in appreciable quantities. The plaintiff introduced testimony of a general character to show that there was. The defendants then, to show that there was not, produced these samples of rock. This was a new character of evidence. We had offered no samples. The ultimate purpose of the use of these samples was to show that they *fairly represented the contents of these crevices*, and to deduce the conclusion that, as they were not mineral-bearing, there was no mineral in these crevices. In fact, their expert witness, Moore, testified that "*these two samples marked 'A' and 'B' is a fair average of the general rock* shown in the Tecumseh shaft," and that these samples were nothing but ordinary porphyry, technically called breccia. The effect of this testimony and the production of these samples was to establish the fact, if the proof was believed and given full credit, that there was nothing but ordinary porphyry in that shaft.

Now, to disprove the ultimate fact thus sought to be established, we offered, by way of rebuttal, a sample of rock, and offered to prove that it came from the Tecumseh discovery shaft, and that it was *mineral-bearing*. We offered this for the purpose, expressed at the time, of rebutting the testimony of Mr. Moore, wherein he had made his samples *a fair average* of this shaft, and to the end that the jury might contrast this sample with the two introduced by defendants, and determine as to the truth of Moore's testimony when he said that their samples *fairly represented this shaft*. This had a direct tendency to meet and disprove the truth of Moore's oral testimony, and break the

entire force of the use of these samples by defendants.

The mere fact that this proof might have been introduced in chief, does not prove that it may not be used in rebuttal. The term "rebutting" is more particularly applied to that evidence given by the plaintiff *to explain or repel* the evidence given by the defendant (Bouvier's Law Dict.; 19 Am. & Enc. Law, 1093). It is perfectly self-evident that the production by plaintiff of mineral-bearing rock, taken from one of the Tecumseh crevices, would tend to repel the testimony of Moore to the effect that the country rock produced by him was a fair average of the Tecumseh shaft. Such evidence falls directly within the definition of rebutting evidence given by the Court. To attempt to take it out of such definition it was necessary to take a *narrow, hypercritical and highly erroneous* view of the issues on trial. By excluding this evidence the Court below made the plaintiff in error the victim of a *grand coup*.

When, near the close of defendant's evidence, Moore produced the samples of plain country rock (which the jury could see at a glance was nothing but common porphyry—a fact which we could not dispute), and testified that these samples of rock were a *fair average* of the Tecumseh shaft, a *deadly snare* was laid for plaintiff's entire cause. If this testimony was true, then we had no discovery in our discovery shaft; and, as the Court held that no discovery elsewhere would avail, we had no case. But fortunately we had a witness present who had a piece of rock that he had, with his own hands,

taken from one of the crevices in the Tecumseh discovery shaft. Its production would plainly and overwhelmingly contradict the testimony of Moore, and destroy the force of the samples he had produced. Of course it would not show (neither was it necessary to show), that the Moore samples did not come from the same shaft. We never claimed that all of the rock exposed in this shaft was mineral-bearing. We only claimed that rock could be taken from certain crevices that was mineral-bearing. The vital point of Moore's testimony consisted of the assertion that his samples fairly represented our entire shaft, and when we proposed to give this statement a *fatal blow* by producing a sample *entirely different* from his, and that was *clearly mineral-bearing*, the *trap* was sprung by an objection, and the *coup* was executed by a ruling excluding the evidence. This Court can imagine (we hope, at least that it can,) the effect upon a jury of such a tragedy. We call it a *tragedy* for it was nothing less than a *murder of our cause.*

The Supreme Court of Colorado does not intimate that this evidence, thus offered in rebuttal, was not material and important, or that error in excluding it was *without prejudice.* It merely holds that we could not use it in rebuttal; and upon that we take issue and submit that issue to this Court.

XVI.

Fraud and Perjury.

The question raised by the nineteenth, twentieth and twenty-first assignments of error have been somewhat discussed under other assignments.

The twenty-second and twenty-third assignments are as follows:

"22. That the said Supreme Court erred in holding that willful use of false testimony, and the manufacture of fictitious evidence by what is known as the 'salting' of the Ophir shaft, was not a ground of reversal of the judgment in said cause.

23. That the said Supreme Court erred in not reversing the judgment herein, instead of affirming the same." (Record, folio 775.)

All we shall say upon this subject will be said in the full light of all that this Court and other Courts have announced upon the subject of their unwillingness to weigh the evidence where the issues of fact have been passed upon by a jury. This verdict is not within the rule. Upon many vital issues in this cause there is absolutely no evidence to sustain the verdict. As to other issues, the evidence, on its face, shows that it was false and fabricated. We have already shown that there was no evidence establishing that defendants had performed their assessment work for 1897, and that, on the contrary, the evidence clearly demonstrated that such work had not been performed. We have also heretofore shown that there is absolutely no evidence tending to prove that the defendants, prior to the discovery in the Tecumseh claim, had disclosed a well-defined crevice in their shaft, or anything resembling a crevice of any kind. We shall now attempt to show that the evidence by which it is sought to show that there was an impregnation, even, disclosed in their shaft at a depth of from twenty-five to twenty-eight feet, was manufactured for the occasion and rested upon fraud and perjury.

The Ophir shaft was examined by Mr. Cone, one of the defendants, together with his superintendent, in the early days of October, 1893. This examination was made for the purpose of a hearing in the Land Office at Pueblo upon the issue as to whether a discovery had been made in that shaft. Mr. Cone, after such examination, testified that the shaft was twenty-five feet deep and contained no vein. Two witnesses for plaintiff made the examination of this shaft about the same time and testified on that hearing that it was twenty-five feet deep. One of them made it two inches less. Not a pick was struck in that shaft from the time of this hearing at Pueblo on October 11, 1893, until the spring or summer of 1895. Then for the first time a claim appears that the shaft was twenty-eight feet deep. Cone said that the shaft was twenty-five deep; that eleven feet of this depth was sunk by his grantors and fourteen feet by himself and partner; that he measured this shaft on the Wednesday previous with a tapeline, assisted by his foreman. Here, then were three men examining this shaft about the same time for the purpose of testifying to the truth as to its depth, and all agreeing that it was twenty-five feet deep; one of the three only made his measurement two inches less. This little variation could readily be accounted for upon the theory that he measured it at a different point. But how could these three men make this shaft twenty-five feet deep if it was really twenty-eight feet. Such a mistake of measuring with a tapeline could not occur once out of a million times. To suppose

that three men measuring a shaft of this depth with a tapeline would vary three feet from the true measurement, and would all make the same identical mistake, is almost to suppose a miracle. It would be more than miraculous. Miracles are generally within the range of possibility. This would be impossible from any rational point of view. How and when, then, was this additional three feet sunk in that Ophir shaft? This is a mystery. It cannot be accounted for except upon the theory of fraud. Our theory is that when they came to clean out this shaft in the spring or summer of 1895, prior to letting the contract for the sinking of it deeper, the depth of the shaft was extended three feet before it was measured up and the contract let. Mr. Cone entered into a contract with certain parties to clean out the shaft at their own expense. Notwithstanding this stipulation in the contract, he paid them $7.50, as he says, for cleaning out this shaft. It appears that two men worked two or three days ostensibly in cleaning out the shaft. It is reasonably certain that these three feet must have been sunk before it was measured up and the contract let for the sinking of forty-two feet deeper, and that this was what Mr. Cone paid for. But it is not incumbent upon us to show when, how or by whom these three feet were sunk. The defendants are claiming a discovery dating back to 1892. Our discovery dates from the spring of 1894. If they claim a depth of twenty-eight feet, they must show that it existed before our discovery. There is not a scintilla of evidence to show that these three feet were sunk prior to

our discovery. Hence, we must assume for all the purposes of this case that the Ophir shaft was only twenty-five feet deep up to the time of our discovery. The Secretary of the Interior rendered a decision on December 28, 1895, in which he found and adjudicated that this shaft was only twenty-five feet deep. He further stated in that opinion as follows:

"Counsel asks that the plaintiff be permitted to make the required improvements, and when the fact has been furnished, that their entry be passed to patent."

At this time, then, there was no pretense of any claim that any work had been done beyond the twenty-five feet. If at that time there had been any other work done, counsel for plaintiff would have been asking to prove that fact, and not that they might do the work and then submit the proof. As to what that shaft contained, the Secretary of the Interior, on this last mentioned date said:

"Counsel for claimants presents an elaborate argument with the view of showing that the character of the alleged discovery of mineral is sufficient upon which to base a valid location in that mining district, and enters into a long discussion of the meaning applied by the courts to the term vein. I do not deem it necessary to go into a discussion of this subject in the case at bar. It is sufficient to say that there must be a discovery of a vein or lode of quartz or other rock in place bearing gold, silver, etc., in order to make a location of or secure a patent for public land under the mining statutes."

On the same subject the Secretary, on March 11, 1896, said:

"It will be seen from this that the points suggested by counsel were all considered in the first instance, and that there is nothing new raised by the motion for review But I think it may with

propriety be said that section 2320 (revised statutes) specifically provides that 'No location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.' Section 2401 (General statutes of Colorado), in defining what shall be done to make a mining location, says: 'A discovery shaft shall be sunk upon the lode to the depth of at least ten feet from the lowest rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice.' The charge here was that there had been 'no discovery of any lode, vein, ledge or deposit,' and in the notice issued this charge was copied. This is the issue, therefore, the lode claimants were required to meet. The defendant Cone admitted on the stand that there was no vein in the Ophir, and there was no attempt made to show that any other form of deposit existed except that by an assay certificate it was shown that mineral was found of the value of $4.50 per ton. By another certification, however, introduced by the protestants, it is shown that there was no mineral in the specimen he had assayed. But whatever might be the conclusion from this evidence, it cannot be controverted that there was no evidence to show that the location had been made in conformity with the statutory requirements. The Department, in the absence of any testimony, can not assume that the geological conditions of any given locality are different from those that Congress had in view when the mining law was enacted, and say the mineral formation is a 'ledge' or 'deposit' as distinguished from 'lode' or 'vein.' "

It will be seen from the above quotation that defendants were contending before the Land Office that the mineral formation at Cripple Creek was such that the statutes of the United States and of the State of Colorado could not be applied thereto. On this trial before the Court, however, this theory was entirely exploded. Every witness in the case admitted that the veins in this district, and the veins in these claims in dispute, when found, were *true fissure veins*, to which the plain

language of all of the statutes could be made to apply.

We have now given the showing made by defendants, and the adjudications made thereon by the Secretary of the Interior, when this Ophir shaft stood precisely as it remained until the spring or summer of 1895. Let us now turn to the case as it is presented upon this record. The shaft has not, at the time in controversy, changed in depth. Mr. Cone testifies that no work was done on this shaft from the time he testified on October 11, 1893, until they resumed work in the spring or summer of 1895. This case turned upon what the shaft contained in 1892. The change was in the testimony. Is the testimony true, or is it fabricated and false? Let us see. Of course, the defendants could not undertake upon false and fabricated testimony to find a crevice or a vein within that shaft at the depth it stood in 1892. Hence, they had to rely upon what they call an *impregnation*. This impregnation is not visible to the naked eye. It can only be *discovered by assays*. Here, then, they enter upon a question about which evidence can be *easily fabricated*. How do they proceed to do it? They use an instrument by the name of Dahl. He is an employé of defendants, and has been for many years. He first appears in this case in the making of an affidavit which contained *willful and corrupt falsehood* enough to send a dozen men to the penitentiary. This affidavit reeked with perjury from beginning to end. We will point out a few of the corrupt falsehoods it contained. He says:

"I first became acquainted and conversant with said property about the month of October, A. D. 1893, but at that time the discovery shaft upon the Ophir lode had been sunk to a depth of not less than forty feet" (record, folio 339).

This was a fifteen-foot lie. He further says that:

"At the point where the Ophir discovery shaft was sunk, the wash on the surface of the mountain was about eight feet in depth, at which depth the solid formation was found; that at that point in the Ophir discovery shaft there was shown in the shaft a well-defined gold-bearing vein which was quite narrow at the point where it outcropped, but *rapidly increased in width as depth was gained*" (record, folio 339).

This was another willful and deliberate falsehood. No man could have honestly given such description of this shaft as that, as it stood in 1893. There is not a witness on either side of the case that pretends there was anything resembling a vein of this description in the Ophir shaft at the depth it stood in 1892 or 1893. He further said in this affidavit:

"I made a careful examination, and brought down certain specimens from the vein and had the same assayed; that it showed the vein to be of good value; the ore contained gold in marketable quantities; that in pursuance of this examination the shaft was sunk to a depth of seventy feet, which is its present depth, and since that time levels have been driven from the bottom along the vein north" (record, folio 343).

This was another infamous falsehood. This affidavit was made for the purpose of obtaining an injunction. The intent, then, was to make the impression, and stand upon the proposition, that this shaft was sunk to a depth of seventy feet in 1893. Hence, this scoundrel testifies that the shaft was

sunk to a depth of seventy feet *in pursuance of the examination he made in October, 1893.* This was for the purpose of antedating our discovery in the spring of 1894, but we were enabled to produce evidence so overwhelming in its character that no work was ever resumed upon this shaft from 1892 until 1895 that this falsehood had to be abandoned. In this affidavit he had described this vein as commencing eight feet from the surface and rapidly increasing in width. When he made that affidavit, he forgot that the shaft was timbered down to a depth of sixteen feet. Hence, he had to invent another infamous falsehood. *One lie begets the necessity for another.* This latter falsehood consists in his statement that when he went to this shaft in October, 1893, instead of going down below the timbers and seeing what the shaft there disclosed, he first stopped at a depth of eight feet and reached his arm in through the timbers and broke off some blossom rock from the apex of the vein which existed in the northeast corner of the shaft. By some species of second sight he was enabled to reach his arm through the timbers and break off this blossom rock at the very point where developments made in 1895 showed that the vein, if it continued on its dip, would be found. But whether it is there—whether it passes on its dip to within eight feet of the surface, or, if it does, how far it is from the timbers of that shaft, never has been revealed to this day. There has never been any exploration behind those timbers to show whether that vein extends above the timbers or not, or, if it does, how far it passes from the shaft as it now

stands. *We think it will be impossible for this Court to study this record without coming to the conclusion that Mr. Dahl was a willful and corrupt falsifier.*

The importance of determining the credibility and character of Mr. Dahl grows out of the fact that if he is dishonest, *the whole case of defendants falls.* This results from the fact that every specimen of ore that was assayed for the purpose of showing that a vein was discovered in the Ophir shaft above the depth of twenty-five to twenty-eight feet passed through his hands. If he would *commit perjury, he would salt ore,* and this brings us to the question as to whether the ore which was sampled and assayed for the purpose of testimony in this case was tampered with or not. We affirm that it was, and will now proceed to show, if we can, the fact. The defendants introduced as expert witnesses, James F. Smith, W. E. Skipworth, Charles J. Moore and E. M. Delavergne. They introduced also James A. Doyle and F. G. Burdette as assayers.

No one of defendants' expert witnesses broke down with his own hands a piece of rock from a point above twenty-five or twenty-eight feet from the surface in the Ophir shaft and had the same assayed. We challenge the defendants to show from this record that any piece of rock taken from this shaft above either of those points, that upon an assay gave appreciable value, *did not first pass through the hands of Dahl.* We charge that the defendants's case was prepared for trial in such a manner that their whole case absolutely depends upon the *honesty and integrity of Dahl.* The case

has been tried twice with their testimony in that shape. Why was this done in this way? Why did not the defendants have some disinterested party, who would make a reputable witness, take with his own hands a piece of rock from the Ophir shaft and assay it, or have it assayed. The answer is plain. *It was because they did not dare to do so.* They knew, and their conduct shows that they knew, that if they sent such a man into the Ophir shaft to break down rock to sample and assay it for himself above where the vein comes in at a depth of thirty-four feet in that shaft, they would get nothing. Hence, all of their samples were taken intentionally and studiously to the end that no piece of rock should come into the hands of an assayer to be assayed that did not first pass through the hands of this man whom we have morally *convicted of deliberate and corrupt perjury.* Their case stood in this shape upon the first trial, and they did not dare to try to change it or to have any additional examinations made of this Ophir shaft between the time of the first and second trial. This false and perjured affidavit of Dahl was made long before the first trial. It may be reasonably presumed that he was confronted with that affidavit upon the first trial. It may be reasonably presumed that it was contended by plaintiff upon the first trial that this ore taken from the Ophir shaft was tampered with, and that the first jury who tried this case believed that it was tampered with. Why, then, in the name of reason, in the name of justice, did not these defendants, between the time of the first and second trial, send

some reputable man into that shaft to obtain a sample and assay it, that Mr. Dahl had not had an opportunity to tamper with? But we maintain that the fraud perpetrated by Dahl is so glaring and shameful *that justice need not be betrayed unless it wants to be.* He perpetrated his fraud in such a *bungling manner* that it speaks for and *exposes itself* even when it appears upon the cold face of this record.

There were three examinations made of the Ophir shaft by the experts and assayers of defendants prior to the first trial of the case. One occurred on May 17, 1897, one on May 19, 1897, and one on May 27, 1897. A large number of persons were present on all of these occasions. On every one of these occasions Dahl broke down the rock that was to be assayed. He gave it to James A. Doyle and F. G. Burdette, who were assayers. He would give the rock to either one or the other of these assayers and they would divide the samples between themselves, with the view of each making an independent assay. On all these occasions the expert witnesses of defendants were present making observations and preparing themselves to testify as to the contents of this shaft. We will now take up the results of the assays made from rock taken upon these three separate occasions from this Ophir shaft above the point where it is conceded the vein was discovered (which is thirty-four feet from the surface). Mr. James A. Doyle testifies that on May 17, 1897, he took two samples; one at a depth of twenty-two feet and one at a depth of twenty-six feet. The one taken

twenty-two feet from the surface ran $7.40, and the one at twenty-six feet ran $3.60. He further testifies that of the samples taken on the 19th of May, one taken at twenty-two feet ran $7.80, and one taken at twenty-five feet ran $4.60, and one taken at thirty feet ran $4 (record, folios 431, 434). These samples were taken out of the corner of the shaft directly above where the vein comes in at a depth of thirty-four feet. It will be seen that these samples and assays from rock taken upon two different occasions gave results that were substantially the same. The variations were but trifling. If these samples were tampered with in any manner, either by sprinkling gold dust upon them at the time they were taken or by blowing gold upon or into the rock that was to be broken down and sampled (a thing that could be easily done), then they were tampered with about in the same manner. Let us now turn to some samples taken eight days later. This same witness testified that on May 27th rock was broken down from this shaft by Mr. Dahl which he assayed; one sample taken at a depth of twenty-two feet ran $16.20; one taken at twenty-five feet from the surface ran $19.20 and one taken thirty-four feet from the collar of the shaft ran $27.40. What a change to take place in eight days! These samples were all taken on three different occasions from the same point in the shaft. The attempt was to show that the vein that comes in at thirty-four feet from the surface extended up in a certain corner of the shaft. They knew precisely where that vein, if it continues on its dip, would be nearest to this shaft. Hence, the

examination was directed to that particular point. A sample taken on May 19th at twenty-two feet ran $7.80; a sample taken on May 27th at twenty-two feet ran $16.20; a sample taken on May 19th at twenty-five feet ran $4.60, while a sample taken on May 26th at twenty-five feet ran $19.20; and a sample taken at thirty feet on May 19th ran $4, while a sample taken at thirty feet on May 27th ran $27.40. What does this argue? It simply demonstrates that on May 27th Mr. Dahl *over-salted this ore. The fraud exposes itself!* Here this scoundrel is making out this shaft at a depth of twenty-two and twenty-five feet to be a paying mine. How does this contrast with the testimony when this shaft was examined in the fall of 1893, as shown by the decision of the Secretary of the Interior, based upon that testimony?

Let us now turn to the testimony of F. G. Burdette, the other assayer. Let it be remembered that Mr. Burdette assayed the very same samples that Doyle assayed. Of the samples taken on May 17th, the one taken at twenty-two feet ran only a trace; the one taken at twenty-five feet ran only a trace, while the one taken at thirty feet ran $1.40. Of the samples taken on May 27th, one taken at twenty-two feet from the surface ran $20.80; one taken at twenty-five feet from the surface ran $21.20 and one taken thirty feet from the surface gave $10.60. According to Mr. Burdette's assaying, the first line of samples practically ran nothing (for it is in evidence that sometimes a piece of country rock may run as high as $1.40), while the second line of samples by his assays are

made to run very much higher than they did under the assaying of Mr. Doyle. According to these assays, that shaft contains $20 and $21 ore at a depth of twenty-two to twenty-five feet. A more *infamous fraud* was never attempted in a Court of justice. It rests on *perjury and fabrication of evidence*. If it were legally possible for this Court to go and enter this shaft it would find that at a depth of twenty-two and twenty-five feet there is no vestige of a crevice, of a vein, or of anything but plain country rock. There is nothing in this record that gives this shaft any other appearance or result except these assays of rock that was manipulated by Dahl. The testimony of the expert witnesses of the defendants was all based upon the faith of the truth of these assays, and the genuineness of the rock from which they were made. As against this testimony, we showed by the testimony of three expert witnesses, namely, Charles Harris, W. C. Wyncoop and Fred. Bruckman that they went to this Ophir shaft on different occasions, broke down rock with their own hands, and either assayed it themselves or had it assayed, and that they never got above a trace. They took the rock from the same identical points that Dahl took his, from right above where the vein passes through the shaft at a depth of thirty-four feet, right at the point that would be nearest to that vein if it proceeds on its dip to a point as high as the one in controversy, and yet could get nothing but a trace. Mr. Fred. Bruckman is an old Leadville assayer, a man of large experience, a man who has been connected with the United States

mint in Denver as an assayer, and a man of sterling integrity. He took down rock from these same identical points with his own hand, kept it in his possession and assayed it and got nothing but a trace. How are we to account for these differences in the testimony of Harris, Wyncoop and Bruckman upon one side, and Burdette and Doyle upon the other? Let it be assumed that they are all disinterested witnesses and all equally entitled to credit. According to the assays of these two men upon one side, there is a paying mine at a depth of twenty-two to twenty-five feet. According to the testimony of these three witnesses on the other side, there is nothing but barren country rock. If these men, equally honest, equally intelligent, can bring out results that are so widely at variance, then such testimony is absolutely worthless. If there is $20 and $21 ore in that shaft at a depth of twenty-two and twenty-five feet, and men like Wyncoop, Harris and Bruckman cannot find any of it, then the supposed science of assaying is a delusion and a farce. If, on the other hand, Burdette and Doyle can produce results of $20 and $21 from points where these other men can discover nothing, then there is a *capacity for fraud and deception in this supposed science that brands it as dangerous to the cause of truth and justice.* These differences is results can be accounted for only upon one theory.

Mr. Doyle testifies:

"I have no assay from the Ophir shaft from any rock taken between twenty feet down to thirty feet which was broken off

with my own hands. ***The rock all passed through the hands of Mr. Dahl*** **(record, folio 446).**

Mr. Burdette testifies to the same thing. He says:

"Mr. Dahl broke those last samples from the wall and handed them down to me. I did not see him sprinkle any gold dust on any of those samples. I do not think he had any to sprinkle; I did not see any; it was not impossible for him to do so; I suppose it could be done; I did not watch to see if there was anything wrong going on there or not; I was taking care of the samples of rock."

Speaking of the samples taken on May 17th, he says:

"Mr. Dahl broke them down and I put them in sacks" (record, folios 459, 461).

We submit upon this evidence that fraud, gross and infamous in its nature, has been perpetrated upon the Court and the jury that tried this case. The results of this pretended sampling and assaying show it. There is nothing standing between us and barren country rock in the Ophir shaft except Dahl. Dahl committed purjury for the defendants, and their conduct said to him, "Well done, thou good and faithful servant!" By that conduct they invited him to perpetrate further wrong and crime in their service. They studiously gave him an opportunity to do so. He was smart enough to know what they expected of him. He boldly met the expectations of his employers. He did the dirty work they intentionally gave him an opportunity to do. If they were not *intentionally* giving him this opportunity, they would have had some honest man break down and handle some

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piece of rock for the purpose of assaying. The question now arises whether a mere verdict of a jury can gild over this infamous crime to such an extent as to preclude this Court from going below the surface, detecting the fraud and branding it as it should be branded. We do not think so. We do not think it can be justly said that there is any evidence that fairly and reasonably supports the proposition that there was a discovery in contemplation of law in the Ophir shaft at a depth of twenty-five or even twenty-eight feet, or at any depth, until a vein was broken into at a depth of thirty-four feet from the collar of the shaft.

This fraud and perjury could never have succeeded on this second trial any better than it did upon the first with a fair and impartial jury. It would have been received only by a packed jury. We do not mean by this to allege that all of the men who were on the jury were dishonest. Experience and observation teach that one, two or three corrupt jurors are very likely to control the jury. They are there for that purpose, and are willing to stay out any length of time to accomplish the purpose. They wear out and talk out the honest element of the jury. We have probably already said enough to satisfy this honorable Court that we believe and intend to charge that the result of this trial was no better than a robbery. The perjurer, the fabricator of evidence, the corrupt juror and the scoundrel who will pack a jury, are as much below the highway robber as the highway robber is beneath an angel. The highway robber does not follow his calling under

an oath of office. All these other men do act under oath. The plaintiff in this case, together with John W. Carr, Edward Carr and P. J. Lynch, have expended on the Tecumseh lode between $12,000 and $15,000 in money and in their own work. This was done while the defendants have only been intending to do assessment work. The Tecumseh is a paying mine, and because it was a paying mine, work upon it has been stopped by injunction in aid of this case. The defendants propose to take from these men all of this labor and expenditure by and through the instrumentalities which have heretofore been pointed out. Can it be done? We do not believe that this verdict and this judgment can stand. We have an abiding faith that the decision of this Court, in this case, will teach some salutary lessons; that it will teach perjurers and fabricators of evidence that although their work may pass before a packed jury, it will not be accepted as truth before this Court; that it will teach Courts that they can not fritter away regular panels of jurors and turn over the framing of a jury in every important case to a sheriff; that it will teach sheriffs that they can not pack a jury with their deputies, their hirelings and their favorites with impunity; that it will teach men who propose to serve on juries, knowing that they have been selected for some corrupt purpose, to frankly reveal the truth upon their *voir dire*, and it will teach all men, whatever other crimes they may commit, to keep their polluted hands and their pestilential breath away from the jury box.

Let us see how the Supreme Court meets this charge of fraud and perjury, or, rather, how it does *not meet it*. It says:

"It is sufficient to say that there is evidence tending to prove *every material issue* tendered by the appellees. Whether *some or all* of this evidence was *false* was a matter *purely within the province of the jury*."

We do not understand this to be a correct statement of the law. It goes beyond any enunciations of this Court, or any other court, so far as we are advised. In Green v. Taney (7 Colo., 278), the Court said:

"And this Court will only interfere where, upon the whole record, it appears that the jury acted so *unreasonably* in weighing the evidence as to suggest a *strong presumption* that their minds were swayed by *passion or prejudice*, or that they were governed by some motive other than that of awarding *impartial justice* to the contending parties."

In Keating v. Pedre (2 Colo., 526), the Court held, that a verdict of a jury which is clearly against the evidence should be set aside. In Barker v. Hawley (4 Colo., 316), the Court said:

"Where the verdict is clearly and manifestly against the evidence, it should be set aside in furtherance of justice."

In Solomon v. Webster (4 Colo., 353), the Court said:

"The judgment, however, in this case, will be reversed on the ground that the verdict is unsupported by the evidence."

In 16 Amer. & Eng. Ency. Law, page 554, the rule is stated:

"Where a verdict is clearly against the *weight of evidence*, it is the duty of the Court to set it aside and grant a new trial."

and authorities too numerous to mention are cited to sustain this statement. And where a cause is submitted to a jury on *several theories*, every issue upon which the verdict might have been predicated *must be sustained by evidence*, for it is impossible to ascertain upon what issue the verdict is predicated (King v. Post, 12 Colo., 355).

We have contended and we still maintain that no fair or honest jury could have rendered the verdict in question. To bring about any such result the defendants had to do two things: (1) They had to pack and corruptly control the jury. (2) They had then to give this jury, through fraud and perjury, a mere pretext upon which they could render a verdict.

We have respectfully submitted, and we again submit, that this record shows that the entire preparation for trial of this cause was made, on the part of defendants, with the view of giving Dahl a chance to salt the Ophir shaft and to pick rock from the Tecumseh shaft which would not assay. Both of these things were perfectly feasible. To salt the Ophir shaft was an easy thing for him to do. This could have been done in two ways. (1) Gold, in solution, could have been blown into or upon the rock. (2) Gold dust could have been sprinkled on the samples. To enable him to do it in one or the other of these ways, it was arranged that he should pick down and handle every particle of rock that entered into a sample for purposes of assay. But, the other side will inquire, how could he take gold out of the Tecumseh shaft so that samples from that shaft would not assay?

This was equally easy. We do not claim that all the rock in the entire shaft will carry gold. Dahl, himself, testified that he could take any number of barren samples he pleased from a shaft that does contain a mineral-bearing vein.

This entire defense is based upon the honesty of Dahl. We venture the assertion that no mining case was ever before prepared for trial in this manner, either in this State or any other. It would never have been planned that way but for some overwhelming necessity.. If they had dared to employ an assayer to go to these shafts and take rock from them, with his own hand, and assay it, and then testify to the result, they would have done so. This is the usual course. They were afraid to do this because they knew that such a man would expose the barrenness of the Ophir, at any depth reached before our discovery, and would be certain to find rock in the Tecumseh discovery shaft, which would assay in appreciable quantities. The testimony of every witness for defendants, bearing upon the question as to whether there could have been any discovery in the Ophir shaft above the 34 foot point, *was predicated upon the assumed genuineness of their assays.*

On two occasions Dahl is put forward to pick rock to be assayed. The samples taken on one of these occasions uniformly ran about $6, while those taken a few days later uniformly ran about $20. This is proof positive of fraud. There can not be any such *uniform variation* between samples taken from the *same exact spot.* Besides, we proved by three as good men as there are in Colo-

rado, who took numerous samples, with their own hands, when they were alone, from the same identical spot where Dahl was getting his $20 ore, that they could never find more than a trace. What does this mean? It means that Dahl salted his samples. He salted them, when on one day, he brought out a *uniform result* of about $6, and he *oversalted* them on the other day when he brought out a *uniform result* of about $20.

Now, can this Court believe that this 25 foot shaft, which was passed upon by the Commissioner and the Secretary of the Interior, contained a vein bearing gold, assaying at $20 per ton? No. You don't believe it. *It is beyond human belief.* You know that this rock must have been tampered with. We don't question the honesty of the assayers. Their assays were, doubtless correctly made, but the rock was salted before it reached them. This is all so clear and plain that no honest jury could have been deceived. This Court has got the power, without antagonizing any of its former decisions, to *redress this awful crime.* The salting of a mine is an act kindred to that of forgery. Suppose this Court, on an inspection of *original documents*, should become certain that the entire *chain of title* of a person who had obtained the verdict of a jury, was a *forgery*, would it hesitate to set aside the verdict? Certainly not; and it could be done either upon the theory that the jury were deceived by the forgery or was, itself, dishonest. If they were deceived by the fraud of defendants, then the verdict should be set aside on the ground of mistake. If they acted from any motive other than that

of awarding impartial justice to the contending parties, it should be set aside on that ground. And, again, if it is not fairly and reasonably supported by evidence, sustaining every issue that the verdict can, under the pleadings and evidence, be predicated upon, it should be set aside.

The Supreme Court of Colorado does not defend this evidence. It merely shifts the responsibility to the jury. It practically admits that some or all of the evidence upon which this verdict and judgment are predicated *may have been false;* but it refuses to inquire whether, *excluding such evidence as is obviously false*, there are issues wholly unsupported by evidence. *False evidence is no evidence.* The Court below says that there is evidence tending to prove every *material issue.* This we deny. There is not a *scintilla* of evidence tending to prove that the annual labor of 1897 was *worth* $100, and the Court, in an attempt to show that there was, stated things that can not, as we have already shown, be found in the record, and things *plainly contradicted* by the record. Again there is no evidence in the record that tends to show that defendants discovered a well-defined crevice, or a vein, in their discovery shaft in 1892. The attempt to show this was a *transparent fraud;* but even this *fabricated evidence* fell far short of establishing this ultimate fact.

XVII.

Questions Arising on Motion for New Trial.

The decisions of this Court are so numerous to the effect that rulings of an inferior federal court, in granting or refusing a motion for a new trial, or a petition for rehearing, will not be reviewed by this Court, that the question may be considered as not open for discussion. The reason of this rule is, that such motions and petitions are addressed to the discretion of the lower court. The rule has no application in cases brought up by writ of error to the highest court of a State, in which such motions and petitions are not a matter of discretion, but, on the contrary, are matters upon which, under State law, error may be assigned.

In Colorado the grounds for a new trial are prescribed by statute, as follows:

"The former verdict or other decision or judgment of the court or referee may be vacated, and a new trial granted on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of said party:

***First*—Irregularity in the proceedings of the court, referee or jury, or adverse party, or any order of the court or referee, or abuse of discretion by which either party was prevented from having a fair trial.**

***Second*—Misconduct of the jury, and when any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of one or more of the jurors.**

***Third*—Accident or surprise, which ordinary prudence could not have guarded against.**

Fourth—Newly discovered evidence material for the party making the application which he could not, with reasonable dilligence, have discovered and produced at the trial.

Fifth—Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice.

Sixth—Insufficiency of the evidence to justify the verdict, or other decision, or that it is against law.

Seventh—Error in law, occuring at the trial, and excepted to by the party making the application. When the application is made for a cause mentioned in the first, second, third or fourth of the foregoing subdivisions, it shall be made upon affidavit or affidavits to be filed with the motion." (Mills' Ann. Code, Sec. 217.)

The ruling of a trial court in Colorado overruling a motion for a new trial is always reviewed by the Supreme Court, *and was in this cause.* Even where a new trial is granted the Supreme Court of that State will review the ruling and may *reverse the order* (Clifford v. Denver S. P. & P. R. Co., 12 Colo., 125). This practice proceeds upon the theory that the rulings of State courts, in granting or refusing a new trial, *are not the exercise of an incontrolable discretion.*

We think there is no case brought up from a State court in which this Court has held that it will not review rulings upon questions raised upon a motion for a new trial; while, in some cases, the rule seems to be expressly limited to cases coming up from inferior federal courts. In Home Ins. Co. v. Barton (80 U. S., 603), this Court said:

"The granting or overruling of a motion for a new trial *in the courts of the United States* rests wholly in the discretion of the court to which the motion is addressed. This is so well settled that it is unnecessary to remark further upon the subject."

In Arkansas Valley Land and Cattle Co. v. Mann (130 U. S.. 69), this Court said:

"The granting or refusing a new trial *in a Circuit Court of the United States* is not subject to review by this Court"

Many of the questions raised on the motion for a new trial relate to errors which occured during the trial, but which could not for want of information, be raised at any earlier stage of the cause.

XVIII.

How Federal Questions Were Raised.

By his complaint the plaintiff in error predicated his *right of possession*, in part, upon a compliance with the laws of the United States, and, in part, upon a compliance with the laws of the State of Colorado and the local laws and rules of miners (Ante., p. 1). The defendants made a similar claim which was denied by plaintiff.

The defendants specially set up a discovery of the Ophir claim on February 3, 1892, and a location and recording of their claim within three months thereafter.

In further assertion of his right and title, under the laws of the United States the plaintiff specially pleaded an adjudication of the Commissioner of the General Land Office and the Secretary of the Interior to the effect that defendants had not, on October 11, 1893, made any discovery. In this plea the plaintiff does not, in so many words, predicate his privilege and immunity, in regard to this asserted right of defendants, on the laws of the

United States; but he makes allegations that are equivalent to so doing. He alleges that defendants made an application for a patent, and he filed a *protest*. This protest was authorized by the laws of the United States. The tribunals which adjudicated with reference to this protest were created by the laws of the United States. Their adjudications, as special tribunals, derived all their force and effect from the laws of the United States. The plaintiff prayed that defendants be precluded from relitigating the questions thus adjudicated (record, folio 12).

The plea of estoppel *in pais* is based upon testimony given in a proceeding, and before officers, created and regulated by the laws of the United States. The assertion, by plea, of a right to have this testimony operate as an estoppel would seem to be an invocation of the laws regulating such proceeding.

The force and effect of the certificate of cancellation of the entry as to the Ophir lode, and the decisions of the Commissioner and Secretary, are entirely dependent upon the laws of the United States. When these documents were offered in evidence a privilege, immunity and right was asserted under such laws.

In other words, having alleged generally that we claimed the right of possession, partly under the laws of the United States, and partly under the laws of the State, we would not, during the course of the trial, be expected every time we made an offer of evidence; an objection to evidence; a request for an instruction, or an objection

to an instruction, to set forth specifically that such offer, request or objection was based upon the laws of the United States. The *subject matter* would determine this fact. In order to claim a right under the laws of the United States it is only necessary to set forth, in some form, the facts which show to the lower Court that a party is relying on such laws. The pleadings clearly show that in so far as the rights of the parties were dependent on the laws of the United States, the plaintiff was claiming that he had, and the defendants had not, done and performed those acts which confer the right of possession. The general allegation of the complaint to the effect that plaintiff claimed the right of possession by virtue of a full compliance with the laws of the United States, was equivalent to allegations of performance of every act required by such laws, in order to acquire such right of possession. A general denial by defendants placed in issue the fact of performance of each and all of such acts.

On the other hand the defendants make a similar general allegation, and then make some *specific allegations*. They *specifically allege* that they made a discovery on February 3, 1892. They do not allege any further or other discovery or any discovery at any other time. They are not, therefore, entitled to prove or rely on any discovery at a later date; *and it stands admitted that they never made the discovery* they allege. But, waving this point, and treating the answer as a general claim of compliance with the laws of the United States, it is certain that the general denial contained in the repli-

cation of plaintiff put in issue every act which the defendants were, by the laws of the United States, required to perform in order to be entitled to possession. When, therefore, either party introduced evidence tending to show a compliance with the laws of the United States *he was specially claiming a right under such laws.* When the plaintiff asked an instruction bearing upon the question as to what constituted a compliance with the laws of the United States he was certainly making a claim under such laws. When the plaintiff made an objection to evidence, or to an instruction of the Court, which related to any question as to whether he or the defendants had complied with the laws of the United States, he was asserting a claim under the laws of the United States, and within the general issue as to whether such laws had been complied with. We think these principles are clearly deducible from the decisions of this Court (Chicago, Burlington and Quincy R. Co. v. Chicago, 165 U. S., 226).

It was certainly proper for plaintiff to prove that he entered upon the unoccupied public domain and located a claim in accordance with the laws of the United States. He made three distinct discoveries in 1894—two of them being *undisputed.* What better proof could there be that this ground was unoccupied public domain than the decisions of the Commissioner and Secretary that defendants had, on October 11, 1893, made no discovery. These decisions, coupled with the fact that defendants did no work from 1892 to 1895, establish the fact that plaintiff made the first discovery.

The questions as to what constitutes a vein, and what constitutes the discovery of a vein, within the meaning of the act of Congress, and the question as to the *place* at which such vein must be uncovered, in order to constitute a compliance with such act, are all federal questions. They were all fully presented by the introduction of evidence, by the asking of instructions, and by objections to instructions. It is certain that, *in all of these forms*, right, title, privilege and immunity, based upon the laws of the United States, were asserted by both parties against the other. The opinion of the Court below, overruling our petition for a rehearing, makes quotations from our briefs, which show that we were expressly asserting claims under the laws of the United States (Ante, p. 74).

The entire question of annual labor arises upon the laws of the United States. No State statute touches the same. The act of Congress requiring defendants to perform annual labor *worth* $100, was so construed as to allow a statement of Cone that he had *paid* $116 for labor in 1897 (the *actual value* of which he *knew nothing about*) to be received as evidence of a compliance with this act, and this notwithstanding all the direct evidence on the subject of the *actual value* of such labor was that such value was less than the required amount. We set up and claimed a right, privilege and immunity against this verdict and judgment, on the ground that the defendants had not complied with this act of Congress, and this claim was denied. This Court will review the decision of the lower Court *on both the law and the facts*, so far as it may

be necessary to determine the validity of any right set up or claimed under an act of Congress (Republican River Bridge Co. v. Kansas Pacific Railway Co., 92 U. S., 315).

We submit that every federal question that has been discussed in this brief was raised in the trial court, and again raised in the Supreme Court upon its *original presentation*. These questions were all passed upon, either expressly or by some *general clause* of the original opinion. A petition for a rehearing was filed. There is enough in the record to show that this petition was entertained; that briefs were filed in opposition thereto and in support thereof, and that the Court considered and determined federal questions in a further opinion. These questions, even if they had been raised for the first time by our petition for a rehearing, will be reviewed by this Court (Mallett v. State of North Carolina, 181 U. S., 589).

The last opinion of the Court below distinctly shows, on its face, that we claimed that to construe the act of Congress allowing and requiring a vein to be discovered at any place within the limits of the claim, as being in harmony with a State statute requiring this vein to be in the discovery shaft, would prejudice our title, right, privilege and immunity, claimed under that act; and this alone makes a case arising under the laws of the United States (Cooke v. Avery, 147 U. S., 375). It is also apparent from the record that plaintiff in error claimed right, title, privilege and immunity upon the theory that to give the State statute requiring a discovery shaft to show a well-defined

crevice, such construction as to require the vein (required by the act of Congress to be discovered) to be disclosed in the discovery shaft, and all consideration of veins elsewhere discovered within the limits of the claim to be excluded, in an adverse case, would bring the State statute and act of Congress into conflict; and this claim made a federal case.

It is apparent, also, that plaintiff claimed a right, privilege and immunity under the act of Congress requiring each party, in an adverse suit, to establish his own title, and that this was denied by the lower Court, when it held that the defendants were not required to make any proof of the performance of annual labor; and this ruling, alone, makes a case arising under the laws of the United States.

And all of these claims of right, title, privilege and immunity under the laws of the United States, were asserted and maintained under, and by virtue of, and in support of, the general allegation of the complaint that plaintiff is entitled to possession by virtue of a full compliance with the laws of the United States, and a denial, by replication, that defendants are so entitled.

The refusal to consider the question, as to whether the State statute, construed as requiring the discovery of a vein *in the discovery shaft*, is in conflict with the act of Congress allowing such discovery at *any place within the limits of the claim*, was equivalent to denying the right, title, privilege and immunity claimed under and by virtue of such

conflict (Des Moines Navigation & R. Co. v. Iowa Homestead Co., 123 U. S., 552).

It clearly appears that the Supreme Court of Colorado regarded the pleadings, offers of instructions, objections to instructions, offers of evidence and objections to evidence, as sufficient forms by which to assert claims of right, title, privilege and immunity under the various acts of Congress to which we have alluded, and, in the main, has *actually decided these questions* and denied such right, title, privilege and immunity; and this operates to give jurisdiction to this Court (F. G. Oxley Stave Co. v. County of Butler, 166 U. S., 648).

A federal question raised for the first time in the Supreme Court, and *actually decided*, on *its merits*, by that Court, is reviewable here, notwithstanding it may not have been raised in the trial Court (Sully v. American National Bank, 178 U. S., 289).

In Green Bay & Mississippi Canal Co v. Patten Paper Co. (172 U. S., 58), this Court said:

"But no particular form of words or phrases has ever been declared necessary in which the claim of the federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up *or claimed* in the State Court in such manner as to bring them to the attention of the Court."

Where a right, title, privilege or immunity is *expressly denied* which depends for its support *solely upon the laws of the United States*, it will be taken that the same was *specially claimed*, (for otherwise it would not have been denied) and it will be presumed that the Court below knew that it was

specially claimed *under the laws of the United States.* There can be no presumption that the Court below was ignorant of the law. It would be quite impossible for the highest court of a State to suppose that a person was claiming a right, title, privilege or immunity under the State law, which was regulated (and solely regulated) by the laws of the United States.

XIX.

Extent of This Review.

In the event that this Court finds that it has jurisdiction, and that a federal question was erroneously decided by the Court below, the further question then arises as to whether this Court will review the entire cause or will limit such review to the federal questions presented by the record. Upon this point we ask the Court to reconsider the case of Murdock v. Mayor, etc., of Memphis (20 Wall., 590). We are inclined to think that the error in it leads to another error, to wit: That if this Court, looking beyond the federal questions erroneously decided, can find in the record some question arising upon State or common law, broad enough to control the case, *even though the same has also been erroneously decided,* it will refuse to entertain jurisdiction. It seems to us that this latter holding amounts to an abdication of a jurisdiction plainly devolved upon this Court by Congress. It would seem to be the plain duty of this Court to see that on the whole case, the judgment was right before it would refuse to reverse because of an erroneous decision of a federal question. At all

events where the federal question has actually been erroneously determined, in express terms, the fair presumption is that its determination was necessary to the judgment. We do not, however, understand that, in this cause, any question arising upon State or common law was decided, which could have the effect of controling the judgment, and certainly this Court would forever seek in vain to find in the record any question, of any kind, that was correctly decided by the Court below.

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